Supreme Court, U. S.
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80-833

No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

v.

CITY OF HARTFORD, CITY MANAGER OF THE CITY OF HARTFORD, COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD, CONTRACT ENFORCEMENT COMMITTEE OF THE CITY OF HARTFORD, AND RONALD FLETCHER, INDIVIDUALLY AND AS SENIOR FIELD REPRESENTATIVE OF THE COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM S. ZEMAN
JOEL M. ELLIS
18 North Main Street
West Hartford, Connecticut 06107
(203) 521-4430
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether a City may, as a subordinate governmental body, absent any finding that it or any other municipality has engaged in employment discrimination, voluntarily establish a goal for membership, training and employment of minorities (defined as including women) for public and private construction projects in an area encompassing the City and 23 other separate municipalities and require preferential hiring for and referral to City financed construction projects to the detriment of non-minority job applicants.

2. Whether it is sufficient for such a City legislatively to adopt such a goal and preferential hiring requirement based solely on a non-particularized general finding of industry-wide employment discrimination in the affected area.

3. Whether a Court of Appeals may abjure a resolution of the threshold issue of a City's authority to so legislate in regard to employment discrimination and refuse to remit that issue for resolution to the state court.

4. Whether a City in implementing such a preferential employment requirement for City construction projects may require a union to refer preferentially minority applicants to those projects contrary to the requirements of the union's chronological Out of Work List which was established pursuant to its pre-existing collective bargaining agreement.

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Petitioner LOCAL UNION NO. 35, IBEW, respectfully prays that a Writ of Certiorari issue to review the decision rendered by the United States Court of Appeals for the Second Circuit entered in this case on June 13, 1980.

OPINIONS BELOW

a. Administrative

The opinion of the Contract Enforcement Committee of the City of Hartford dated and rendered July 7, 1977 is unreported and is reproduced in the Appendix A61.

b. Court

The opinion of the United States Court of Appeals for the Second Circuit (App. A1) is reported at 625 F.2d 416 and at 22 FEP Cases 1786. A denial of a petition for rehearing and suggestion for rehearing en banc (App. A68) is not reported. The opinion of the district court (App. A28) is reported at 462 F. Supp. 1271 and 18 FEP Cases 1338, its ruling on post-judgment motions (App. A56) and its judgment (App. A66) are not reported.

JURISDICTION

The opinion containing the judgment of the United States Court of Appeals for the Second Circuit was dated and filed on June 13, 1980. That court's order, denying your petitioner's Petition For Rehearing and Suggestion For Rehearing En Banc was dated and filed on September 3, 1980. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, GOVERNOR'S EXECUTIVE ORDER, CITY CHARTER AND CITY ORDINANCE

1. Constitutional Provisions.

a. United States

Amendments to the Constitution

V.

No person shall be...deprived of life, liberty, or property, without due process of law....

XIV.

Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

b. Connecticut

ARTICLE FIRST:

Sec. 20. No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin.

2. Statutes

a. Federal

28USC §1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

28USC §1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:...

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 USC §1981

All persons...shall have the same right in every State... to make and enforce contracts..., and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 USC §1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State,...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 USC §2000e-2

Unlawful employment practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail...to hire...or otherwise to discriminate against any individual...because of such individual's race ...sex, or...

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive...any individual of employment opportunities...because of such individual's race,...religion, sex....

(b) It shall be an unlawful employment practice for an employment agency to fail...to refer for employment, or otherwise to discriminate against, any individual because of his race...sex,...or to classify or refer for employment any individual on the basis of his race,...sex....

(c) It shall be an unlawful employment practice for a labor organization—

(1) to...discriminate against, any individual because of his race,...sex...

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail...to refer for employment any individual, in any way which would deprive...any individual of employment opportunities...or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race,...sex...;or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

. . .

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply...different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system...provided that such differences are not the result of an intention to discriminate because of race,...sex....

b. State - Connecticut

CHAPTER 563
FAIR EMPLOYMENT PRACTICES

. . .

Sec. 31-122:...[Definitions]...

(c) "employment agency" means any person undertaking...to procure employees or opportunities to work;

(d) "labor organization" means any organization which exists for the purpose,...of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment...

(f) "employer" includes the state and all political subdivisions thereof and means any person or employer with three or more persons in his employ...

(h) "commission" means the commission on human rights and opportunities created by section 31-123....

Sec. 31-123. Commission on human rights and opportunities. Appointment. Duties.

The commission shall...investigate the possibilities of affording equal opportunity of profitable employment to all persons, with particular reference to job training and placement. The commission shall compile facts concerning discrimination in employment, violations of civil liberties and other related matters. The commission shall investigate and proceed in...all cases of discrimination in employment because of race, color, religion, sex, age, national origin or ancestry....

§31-125.

The commission [on human rights and opportunities] shall have the following powers and duties:

. . .

(e) to receive, initiate, investigate and mediate complaints of unfair employment practices....

§31-126. Unfair employment practices.

It shall be an unfair employment practice (a) for an employer, by himself or his agent...because of the race,... sex...of any individual, to refuse to hire...such individual or to discriminate against him in...terms, conditions or privileges of employment; (b) for any employment agency...to fail or refuse to classify properly or otherwise to discriminate against, any individual because of his race,...sex...; (c) for a labor organization, because of the race,...sex...of any individual to...discriminate in any way against any of its members or against any employer or any individual employed by an employer...; (e) for any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts herein declared to be unfair employment practices or to attempt to do so....

§31-127. Procedure.

Any person claiming to be aggrieved by an alleged unfair employment practice may...file with the commission a complaint.... The commission...may issue a complaint.... After the filing of any complaint, the chairman of the commission shall refer the same to a commissioner...to make prompt preliminary investigation...and, if such commissioner...determines...that there is reasonable cause for believing that an unfair employment practice has been...committed...he shall immediately endeavor to eliminate the...practice.... In case of failure to eliminate such practice, the...investigating commissioner shall certify the complaint and the results of his investigation to the chairman of the commission.... The chairman of the commission shall thereupon appoint a hearing tribunal.... If...the tribunal finds that a respondent has engaged in any unfair employment practice, it shall...cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair employment practice and further requiring such respondent to take such affirmative action...as in the judgment of the tribunal will effectuate the purpose of this chapter....

§ 31-128. Enforcement of orders. Appeals.

(a) The commission may...petition the court...for the enforcement of any order issued by a tribunal under the provisions of this chapter and for appropriate temporary relief or a restraining order.... The court shall have jurisdiction of the proceedings and of the questions determined thereon, and shall have the power to grant such relief by injunction or otherwise, including temporary relief, as it deems just and suitable and to make and enter...a decree enforcing...any order of the commission or hearing tribunal....

[Note: The Connecticut legislature in 1980 adopted Public Act 80-422 which amended many of the above provisions in Chapter 563. The amendments were technical in nature and did not change the substance of the legislation set out above.]

3. Governor's Executive Order No. 3

WHEREAS, sections 4-61d(b) and 4-114a of the 1969 supplement to the general statutes require nondiscrimination clauses in state contracts and subcontracts for construction on public buildings, other public works and goods and services,...

NOW, THEREFORE, I, THOMAS J. MESKILL, Governor of the State of Connecticut, acting by virtue of the authority vested in me under section twelve of article fourth of the constitution of the state, as supplemented by section 3-1 of the general statutes, do hereby ORDER and DIRECT, as follows, by this Executive Order:

I

The labor commissioner shall be responsible for the administration of this Order.... Upon the promulgation of this Order, the commissioner of finance and control

shall issue a directive...to all state agencies, that...all state contracts and subcontracts for construction on public buildings, other public works and goods and services shall contain a provision rendering such contract or subcontract subject to this Order, and that such contract or subcontract may be cancelled, terminated or suspended by the labor commissioner for violation of or noncompliance with this Order or state or federal laws concerning nondiscrimination....

III

Whenever the contractor...has a collective bargaining agreement...with a labor organization...the labor commissioner may require a compliance report to be filed with... the labor commissioner...by such organization...to the effect that the signer's practices and policies...do not discriminate on grounds of race, color, religious creed, age, sex or national origin, or ancestry of any individual, and that the signer will either affirmatively cooperate in the implementation of the policy and provisions of this Order, or that it consents and agrees that recruitment, employment and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order....

X

(a) The labor commissioner may hold or cause to be held hearings, prior to imposing ordering or recommending the imposition of penalties and sanctions under this Order... [T]he labor commissioner may...

> (2) Recommend to the commission on human rights and opportunities that in cases in which there is substantial or material violation or threat thereof of the contractual provision or related state statutes concerned herein, appropriate proceedings be brought to enforce them....

(4) Cancel, terminate, suspend...any contract...for failure of the contractor...to comply with the nondiscrimination provisions of the contract....

XIII

The labor commissioner may delegate to any officer, agency or employee in the executive branch any function or duty of the labor commissioner under this Order except authority to promulgate regulations of a general nature....

4. Charter - City of Hartford

Chapter II
POWERS OF THE CITY

Sec. 5. Power to adopt regulatory ordinances.

The city shall have power to adopt ordinances not in conflict with the general statutes or the provisions of this charter, for the preservation of the public peace, health, safety, comfort and welfare of the inhabitants of the city and to provide penalties for the violation thereof enforceable in the city and police court but not exceeding a fine of one hundred dollars ($100.00) or imprisonment for more than thirty days or both....

Sec. 7. General grant of powers.

The city shall have not only all the powers specifically granted by this charter but all powers fairly implied in or incident to the powers expressly granted, and all other powers incident to the management of the property, government and affairs of the city the exercise of which is not expressly forbidden by the constitution and general statutes of the State of Connecticut....

Chapter VIII

Sec. 11. Contracts for public works and improvements.

The council shall establish by ordinance rules and regulations under which contracts shall be made and

STATEMENT OF THE CASE

Introduction

Local Union No. 35 is an electrical workers' union which has a contract with an association of electrical contractors which provides that the latter shall use the Union's hiring hall for job referrals. The Union in making referrals uses a non-discriminatory Out Of Work List that lists applicants in chronological order of their signing up and the worker on the list the longest is referred out first. By direct and indirect means the defendant City in attempting to enforce its affirmative action plan requires the Union to jump minorities on the list and refer them in preference to non-minorities who have "seniority" on the list. The Union sought declaratory and injunctive relief in the district court of Connecticut invoking its jurisdiction under 28 USC Sec. 1343(3) and (4)[1] and also its pendent jurisdiction for the purpose of invalidating the City's affirmative action plan contending, *inter alia*, that the plan mandates discriminatory treatment of non-minority employees on the basis of race, in violation of the 14th Amendment to the United States Constitution, 42 USC sec. 1981, 42 USC sec. 1983, and state statutory and constitutional standards. (App. A28-35) The district court denied the Union's motion for summary judgment for a preliminary injunction and granted defendants' cross motion for summary judgment. (App. A28) The Union thereafter filed a Motion to Amend and Make Additional Findings of Fact, a Motion for a New Trial, a Motion to Alter and Amend Judgment, a Motion for Permission to File Third Amendment to Complaint, a Motion for Permission to Amend Proposed Third Amendment to Complaint, and a Motion for Permission to File Fourth Amendment to Complaint. In a subsequent ruling the district court below denied all of the aforesaid post-judgment motions.

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[1]The district court would also have jurisdiction under 28 U.S.C. sec. 1331. The matter in controversy exceeds $10,000 and arises under the Constitution or laws of the United States.

(App. A56) The Union then appealed to the United States Court of Appeals for the Second Circuit ("Court of Appeals") from the judgment below.

The appeal was heard by a three judge panel and on June 13, 1980, a majority of the panel affirmed the judgment below, one judge dissenting. (App. A1) The Union then filed a Petition for Rehearing and Suggestion for Rehearing En Banc (hereinafter "Petition for Rehearing") which was denied on September 3, 1980. (App. A68) On October 9, 1980, the plaintiff filed a Notice of Motion for Permission to File a Petition for Reconsideration of its previously filed Petition For Rehearing and the latter motion was denied on October 30, 1980. On October 11, 1980, the plaintiff filed a Notice of Motion for Modification of Decision and Notice of Motion for Modification of Mandate, both of which were denied on October 30, 1980.

Statement Of Facts

The Union is a labor organization. It represents all electrical workers who work for any and all employers with whom Union has a contractual relationship in six counties all in the State of Connecticut and, also in the Westerly Township of Washington County, Rhode Island. (App. A2) The Union has entered into a collective bargaining agreement with the Central Connecticut Chapter, Hartford Division, National Electrical Contractors Association, Inc. (hereinafter referred to as "NECA"). Said agreement applies to all employers that assent to be bound by it. (App. A31-32). Under said agreement the Union is the sole and exclusive source of referral of applicants for employment with assenting firms. The referral procedure is open to both members and non-members of the Union (App. A32) and the Union is required to refer applicants without discrimination (App. A109). In brief, the referral procedure is on the basis of referring applicants in the order of their place on the Out of Work List. The Out of Work List lists out of work applicants in the chronological

order of the dates they register their availability for employment. (App. A49) Under Article III, section 25(b), of said labor agreement, a contractor is prohibited from discriminating against any employee. (Ct. of App. Jt. App. A6, A91).

In 1975, the City passed an Ordinance, entitled "Article X. Affirmative Action Plan," as part of the Municipal Code of the City of Hartford. (App. A4, A71). Among the stated purposes of said Ordinance is that of ensuring equal employment opportunity for minority group persons [defined as persons of Black, Puerto Rican, Spanish-American, Oriental or American Indian ethnic or racial origin and women] in all phases of construction work performed pursuant to major contracts offered and awarded by the City under the provisions of the (City) Chater and the (City) Code. (App. A71, A73). The Ordinance contains a recitation of legislative policy and findings which are, in pertinent part: (a) Many contractors, labor unions, hiring halls, crafts and trades in the construction industry in the Greater Hartford Area have discriminated, and continue to discriminate, against minority group persons and women....; (c) The continuing effects of past and present discrimination against minority group persons and women by the construction industry may be prevented, mitigated and/or eliminated by an affirmative action plan....; (g) The Thirteenth and Fourteenth Amendments to the United States Constitution, Article 1, Section 20 of the Constitution of the State of Connecticut, 42 United States Code, Section 1981, 42 United States Code, Section 2000(e), Presidential Executive Order Numbers 11246 and 11375, the Governor's Executive Order Number 3, and Chapter II, Sections 5 and 7 and Chapter VIII, Section 11 of the Charter authorize and mandate that the city adopt an affirmative action plan to be incorporated in all major construction or improvement contracts to insure that no public funds are used to promote, maintain or effectuate the denial of equal employment opportunity. (App. A71-72).

The Ordinance, in sec. 2-325 thereof, requires the City Council to adopt a Hartford Affirmative Action

Plan. (App. A74) Pursuant to section 2-328 of said Ordinance, if a labor organization performs substantial construction work beyond the Greater Hartford Area, such organization will be allowed to participate in the construction work required by a City contract but only if it is "certified" by the City Manager or his designee. (App. A76) In order to be "certified" under the above procedure, the labor organization is required to submit an affidavit stating that it agrees with Hartford's affirmative action plan and will make a good faith effort to comply with its provisions. The city manager (or its designee) may issue a certification under the foregoing only if, *inter alia*, it finds that public funds will not be used, directly or indirectly, to promote or maintain discrimination as a result of such certification and the documents and data submitted clearly indicate that such organization has accepted, is accepting or will in the immediate future be accepting adequate minority group and women participation in its operations. (App. A76-77) The Union was so certified on October 31, 1975. (App.A7)

Pursuant to said Ordinance the City adopted "The Greater Hartford Affirmative Action Plan." (App. A4) Said Plan is incorporated into City construction contracts; a breach of the Plan constitutes a breach of the construction contract and subjects the contractor to remedies provided in the Ordinance. (App. A5, A82). The Plan provides that the parties to it agree to make every good faith effort over a five year period to achieve a level of membership and employment of qualified minority group employees on public and private construction work in the Hartford Labor Market area [2] to at least 15% (App. A83-86) and the City is required to set minimum participatory goals on City projects for minority personnel which shall be at least 15% of the daily manhours worked by each trade on each project. (App. A86-87). The contractor and its labor referral union

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[2]Defined as encompassing Hartford and 23 surrounding municipalities. (App. A84)

are to bear the responsibility to achieve that goal. (App. A86). The Plan deals with the training of applicants and also requires that all apprentice applicants shall be subject to the guidelines set forth by federal and state requirements for registered apprenticeship programs. (App. A97). The Plan provides that it is not the intent of the Plan to interfere with any bona fide seniority system which does not perpetuate past discrimination (App. A103) and that it is not the intent of the City to violate any laws of any governmental authority having jurisdiction of the subject matter of the agreement [Plan] and the City agrees that, in the event any provision of the agreement [Plan] is held unlawful the remainder shall remain in force, if severable. (App. A104). At the May 16, 1977, hearing before Judge Blumenfeld, the City conceded that if there is any inconsistency between federal and state law and the Plan, the Plan must yield to the federal or state law. (Court of Appeals Jt. App. A44)

Rather than setting a "goal" of 15% the City has set a mandatory "quota" of 15% on City projects for the employment of minority persons on a trade-by-trade basis for the contractor's daily work force. (Court of Appeals Jt. App. A7-A8, A34, A101).

By Memorandum dated February 28, 1977 from Arthur Johnson, executive director of the Commission on Human Relations for the City of Hartford addressed to the City's Contract Enforcement Committee, Mr. Johnson indicated that based on a staff report, the Union's use of its referral list to refer workers to contractors performing construction work on City projects will be directly in conflict with the minority manning provisions of the City's Plan. (App. A105) The staff report recited that contractors reported that their referral agreement with Local 35 preempted their utilizing other sources to comply with the minority manning requirements for City projects. (App. A107) The report stated that the Union informed the City that it was using a rotation system for the referral of workers; that

the Union's position was that such rotation list took precedence over any minority manning requirements in the Plan; that the following statistics were supplied; IBEW #35 total membership - 550; Working - 229; Not Working - 321; Total minority - 41; Minority working - 24; Minority not working - 17; that as of 2/8/77 the rotation list contained 321 names; and that minority workers occupy the following positions on that list: 85, 94, 121, 145, 157, 166, 167, 184, 188, 204, 212, 224, 236, 238, 287, 299, 308. The report concluded that the use of the list for the referral of minority workers would directly conflict with the minority manning provisions of the "Greater Hartford Plan." (App. A107-108).

In the NECA contract, under Article VII (Referral Procedure) (App. A109) the Union is to maintain a register of applicants for employment based on four groups. (App. A110) Group I, the highest group, consists of applicants who have four or more years of experience and are journeymen and who are residents of the geographical area constituting the normal construction labor market as defined therein. (App. A110) In the instant case, all the [321] workers who were unemployed were in Group I, all of the [321] applicants on the Out of Work list were in Group I, all the [17] minorities on that list were in Group I, and all of the [41] minority members of the Union were in Group I. (Court of Appeals, Jt. App. A109, A116, A117, A126)

On April 5, 1977, the plaintiff filed its Complaint in the United States District Court in Hartford, Connecticut seeking therein a preliminary injunction. (Court of Appeals, Jt. App. A4).

The City's Contract Enforcement Committee held a public hearing to consider Mr. Johnson's determination of the Union's non-compliance. (App. A33).

At the hearing Mr. Johnson testified that the Union was in violation of the Plan and the Ordinance [solely] because of the way the Union operated its referral list. (Court of Appeals Jt. App. A112-A113). Mr. Aresco, attorney for the Committee ruled that the issue was that the operation of the list would not supply "the necessary quota" that the City required. (Court of Appeals Jt. App. A113). Mr. Johnson testified that when the Union was certified under the Plan in October, 1975, it had supplied to his office as part of the certification procedure a copy of its labor agreement with NECA. (Court of Appeals Jt. App. A114). Mr. Fletcher, Mr. Johnson's assistant, then testified that he recommended to Mr. Johnson that the Union be disqualified because its referral list was preempting contractors from meeting the minority manning requirements. (Court of Appeals Jt. App. A115). He explained that workers signed the list when they became unemployed and the earliest one signing was referred first. (Court of Appeals Jt. App. A115, A116, A117). He agreed that the minority workers were in the position they were on the list because that was when they signed it. (Court of Appeals Jt. App. A117). He stated that over 50% of the Union members were unemployed and that the percentage of minorities unemployed was less than the percentage for the total membership unemployed. (Court of Appeals Jt. App. A118). Both Mr. Fletcher and Mr. Johnson testified that the Union should, in effect, jump minorities ahead of others on the list when making job referrals. (Court of Appeals Jt. App. A119-A120).

Robert W. Murray, business manager for the Union, testified that the referral list wor. :d in an impartial and neutral chronological manner (Court of Appeals Jt. App. A122-A123); that the list was established about a year and a half ago in the winter of 1975-1976 (Court of Appeals Jt. App. A124-A125); that before that there was no need for a list because there was a lack of unemployment (Court of Appeals Jt. App. A124); that about January 1977 the Union received a letter from Mafco (Court of Appeals Jt. App. A104) [a contractor] requesting a

minority person which would have required referring a worker who was not first on the list (Court of Appeals Jt. App. A123); that prior to the Mafco incident (when Mafco laid off two people and called for two black replacements) the Union had jumped men on the list to satisfy the affirmative action program (Court of Appeals Jt. App. A125), but when the Mafco request was made the Union consulted with its attorney and he advised the Union that under State and Federal law the Union was obligated to operate the list strictly on a rotation basis and, therefore, Mafco's request could not be honored (Court of Appeals Jt. App. A123-A124); that the Union followed that advice and it would continue to operate the list strictly in rotation of the top man on the list. (Court of Appeals Jt. App. A124). Mr. Murray testified that the Out of Work List was established pursuant to section 11 (page 20) of the NECA contract. (Court of Appeals Jt. App. A126). Said sec. 11 provides as follows: "The Union shall maintain an 'Out of Work List' which shall list the applicants within each group in chronological order of the dates they register their availability for employment." (App. A112) [The Transcript of the Commiteee hearing was submitted to the District Court as part of the support for the plaintiff's later filed Motion for Summary Judgment. The above evidence was undisputed.]

The Contract Enforcement Committee decided that use of the referral list evidenced the Union's lack of good faith effort to comply with the Plan and, therefore, the Union would be decertified. (App. A61). The Committee also found that the Union had been in compliance when it previously had referred minorities out of chronological turn. (App. A62).

Thereafter, in the trial court, the City filed a motion for summary judgment and the Union filed a motion for summary judgment on its request for a preliminary injunction. A court hearing was held on said motions on August 3, 1977, before Judge Blumenfeld. (Court of Appeals Jt. App. A127, A128). At said hearing the following occurred:

"**The Court:** The plaintiff has not challenged and does not challenge that there is past discrimination... **Mr. Ellis:** ...Your Honor...suggested that there has been some finding of past discrimination which the union does not challenge. That is not correct. There has been no finding of past discrimination against this union. That is not in issue in this case at all.... I don't dispute that the city has made...a legislative finding, your Honor, as a generality. But as to this particular union, there has been no particular finding that this union is guilty of past discrimination which has any continuing effects today." (Court of Appeals Jt. App. A132-A133). Mr. Ellis' statement was never disputed.

At the conclusion of the August 3, 1977, hearing the court invited the parties to submit to it any new matter that each might come across in their research pending the trial court's ruling. (Court of Appeals Jt. App. A138).

On March 2, 1978, the defendants filed "Defendants' Supplemental Memorandum In Opposition to Plaintiff's Motion for Preliminary Injunction And Summary Judgment, And In Support of Defendants' Motions to Dismiss And For Summary Judgment"[3] (hereinafter referred to as "Supplemental Memorandum"). In defendants' Supplemental Memorandum (pp. 13-14) the claim was made that the City council had substantial evidence before it to support its legislative finding and that the statistical evidence pointing to discrimination in the construction industry was overwhelming (p. 20). In its April 1978, memorandum in response thereto,[4] the Union explained that at the "stage of the proceedings" in which the case was at that time the City's legislative finding was not in issue and therefore the offer of the evidence of legislative history and the argument based thereon

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[3]Said memorandum is docket entry no. 32 and appeal index no. 3.

[4]Said memorandum is docket entry no. 36 and appeal index no. 27.

was irrelevant. (p. 8). Even so, the Union presented an argument in said memorandum that the "evidence" submitted by the City did not, in fact, support any legislative finding of past discrimination. (pp. 8-11). After the *Bakke*[5] case was decided the issue of the authority of the City to make its legislative finding was argued. On page 8 of "Plaintiff's Supplemental Brief Re Bakke"[6] the Union made the claim that the City had no authority to make any such legislative finding because it possessed no authority to adopt the Ordinance or Plan. (Court of Appeals Jt. App. A166).

On July 3, 1979, the Union filed a Second Amendment to the Complaint in which it asserted a cause of action against the City under 42 USC sec. 1983. (Court of Appeals Jt. App. A152).

On December 11, 1978, the trial court filed its Ruling on Pending Motions in which it denied the Union's motion for summary judgment for a preliminary injunction and granted the City's motion for summary judgment. (App. A28). The Union then filed a variety of post judgment motions. (Court of Appeals Jt. App. A208-A214). In its Motion For A New Trial it was claimed that the court erred in refusing to consider the Union's claim that the City had no legal authority to adopt its Ordinace and Plan. (Court of Appeals Jt. App. A211). The district court denied the post judgment motions in its Ruling on Pending Motions filed March 7, 1979. (App. A56).

In "Defendants Memorandum In Opposition to Plaintiff's Post-Judgment Motions.[7] filed January 29,

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[5]438 U.S. 265 (1978).

[6]Said brief is docket entry no. 39 and appeal index no. 30.

[7]Said memorandum is docket entry no. 52 and appeal index no. 5.

1979, the City conceded that "The affirmative action ordinance is not directed against Local Union No. 35...." (memo. pp. 5-6).

In its brief before the Court of Appeals, the Union pursued its claim that the City possessed no authority to adopt an affirmative action plan Ordinance or Plan in implementation thereof (P's Court of Appeals Brief, pp. 14-21). In affirming the judgment below, the Court of Appeals ignored said issue (App. A1) In its Petition for Rehearing, plaintiff argued that the Court of Appeals erroneously failed to resolve this issue. (P's Petition for Rehearing, p. 7). The Petition For Rehearing was denied without opinion. (App. A68). The plaintiff then filed a Notice of Motion for Permission to file Petition for Reconsideration of said Petition for Rehearing on the asserted ground that plaintiff's counsel had subsequently discovered two unpublished Connecticut state trial court decisions both of which are currently on appeal to the Connecticut Supreme Court wherein the City of New Haven's Commission on Equal Opportunities [established by City ordinance] and its orders were ruled invalid on the ground that the City had no statutorily delegated authority to regulate employment practices protective against racial discrimination. As an additional ground, plaintiff's counsel pointed to newly enacted Connecticut Public Act 80-403 [of which said Counsel had been previously unaware] which was passed in response to the above unpublished cases and which gave municipalities [prospective] power to establish equal rights and opportunities commissions which would have power, *inter alia*, to remedy employment discrimination. The purpose of seeking to file the petition for reconsideration was to argue to the Court of Appeals that since it had refused [and, thus, abstained] from addressing the threshold state law issue of the City's authority to adopt its Ordinance and Plan it should remit that question to the state court for resolution. Said Motion was denied on October 30, 1980. For the same purpose, the plaintiff on October 11, 1980 filed with the Court of Appeals a Notice of Motion for Modification of Decision

and a Notice of Motion For Modification of Mandate. The latter motions were denied on October 30, 1980.

ARGUMENT

A. A CITY, AS A SUBORDINATE GOVERNMENTAL BODY, MAY NOT LEGISLATIVELY ESTABLISH AN AFFIRMATIVE ACTION PLAN IN REGARD TO PUBLIC AND PRIVATE CONSTRUCTION EMPLOYMENT BASED ON GENERALIZED NON-SPECIFIC FINDINGS OF EMPLOYMENT DISCRIMINATION NOR MAY IT, ON THE BASIS OF SUCH FINDINGS, JUSTIFY RACIAL PREFERENCES FOR HIRING ON CITY CONSTRUCTION PROJECTS.

The City could not have induced anyone to agree to its Plan if thereby an entity would be deemed to have admitted that it had engaged in discriminatory acts. So the City's Ordinance indulged in no particularized findings of discrimination which in turn permitted entities to join the Plan free from fear they would be open to accusations of discrimination such as those speculatively indulged in by the Court of Appeals. (App. A11) Thus, the Ordinance and Plan did not assume or establish that those that joined it were guilty of discrimination. Therefore, one question raised by this case is whether a political subdivision of a state can require an innocent participant in its affirmative action plan to refer for employment minorities in preference to non-minorities. Neither *Bakke, Weber* or *Fullilove*[8] involved this issue. In general terms, *Fullilove* involved the right to bid on a government contract that did not involve the status of the bidders as individuals. It could be said that there

[8]Respectively, (1978) 438 U.S. 265; (1979) 443 U.S. 193; (1980) 100 S.Ct. 2758.

was no personal value of freedom to pursue a vocation that was derogated by the classification of bidders in *Fullilove*. But in our case there is implicated the status of the non-minority job applicants as individuals and this Court has held that the basic "right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, (1915), 239 U.S. 33, 41. Here the non-minorities are penalized as individuals solely because of their race. Since the preferential referral required by the City constitutes state action detrimental to persons solely because of that person's race the requirement is offensive to the Equal Protection Clause of the Fourteenth Amendment.

Since the governmental action in this case trenches upon values that are fundamental that action should be the product of a deliberate and broadly based political judgment. Such governmental action should be the product of a process that is entitled to speak for the society. *Associated Gen., ETC. v. San Francisco Unified SCH.*, (CA 9th, 1980), 616 F.2d 1381 1390. The City, as a subordinate governmental institution, does not meet that test for its action "is likely to be the product of partial political pressures that are not broadly reflective of society as a whole." *Sandalow, Judicial Protection of Minorities*, 75 Mich. L. Rev. 1162, 1188 (1977). As a subordinate governmental body not possessing the sweeping powers of a Congress nor even the less sweeping powers of a state legislature, the City had no constitutional right to address regional discrimination, identify it by non-particularized findings and then justify its racial preference policies thereon. *Associated Gen., ETC.*, supra, and at 1390 n. 14; *Fullilove v. Klutznick* (1980) 100 S.Ct. 2758, at p. 2794 n. 14. ("The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body." Powell,J.)

B. THE CITY POSSESSED NO AUTHORITY TO ADOPT THE ORDINANCE OR PLAN

The City of Hartford (hereinafter "City") is a political subdivision of the State of Connecticut occupying a part of the territorial area of the state. *Norwalk v. Daniele,* (1955), 143 Conn. 85, 88, 119 A.2d 732. As a municipality it is solely a creation of the state and it has no inherent powers of its own. *Pepin v. Danbury,* (1976) 171 Conn. 74, 83, 368 A.2d 88. Unlike the inherent powers that appertain to the state legislature the only powers that a Connecticut town or municipality has are those granted to it by the state. *Pepin,* supra, p. 83; *Council of the City of West Haven v. Hall,* (Conn. Supreme Court, Apr. 15, 1980) 41 Conn. Law Journal, No. 42, pp. 8, 10. The only appropriate sources of authority which the City relies on as authorizing it to enact its Ordinance are Article 1, Section 20 of the Connecticut Constitution (supra, p. xi), the Governor's Executive Order Number 3 (supra, p. xvi) and Chapter II, Sections 5 and 7 and Chapter VIII, Section 11 of its Charter.[9] (supra, p. xviii) Article First, section 20 of the State Constitution provides that "No person shall be denied the equal protection of the law nor be subjected to ...discrimination in the exercise of his civil...rights because of ...race...." The city has been given no enforcement power in regard to Section 20 and that section does not constitute an express source of authority for its Ordinance. *Associated Gen., ETC. v. San Francisco Unified SCH.,* (CA 9th, 1980), 616, F.2d 1381, 1386-1388; *Matter of Broidrick v. Lindsay,* (1976) 39 NY 2d 641, 350 N.E. 2d 595; see, also, *Southeastern Community College v. Davis,* (1979) 442 U.S. 397 (Rehabilitation Act prohibiting discrimination against handicapped persons did not impose affirmative action obligation on recipients of

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[9]The claimed federal sources of power set forth in the Ordinance [App. A72] are inapposite. There was no evidence that any federal authority required the City to adopt the Ordinance or Plan. The City has no enforcement authority under said federal sources.

federal funds.) The Governor's Executive Order Number 3 applies only to state contracts and does not deal with municipalities in any respect. (supra, p. xvi).[9a] Charter Sec. 5 provides that the City may not adopt ordinances in conflict with the general statutes, (supra, p. xviii). This is not a grant of authority to pass the Ordinance. Charter section 7 provides that the City shall have implied powers incident to the powers expressly granted. (supra, p. xviii). Since there was no express power there could be no implied power to pass the Ordinance. *Council of the City of West Haven*, supra. Charter section 11 provides that the City may pass ordinances concerning city contracts and provides that the same may be awarded to the lowest *responsible* bidder. (supra, p. xviii). The criterion of "responsible" bidder does not authorize a requirement that a bidder adhere to an affirmative action plan. *Associated Gen., Etc. v. San Francisco Unified SCH.*, supra, p. 1385; see *Austin v. Housing Authority*, (1956), 143 Conn. 338, 344-346, 122 A.2d 399, and *Matter of Broidrick v. Lindsay*, (1976), 39 NY 2d 641, 648, 350 N.E. 2d 595.

A Connecticut municipality may not pass an ordinance which deals with the same subject matter as that dealt with by an act of the state legislature. *Southport v. Ogden*, (1854), 23 Conn. 128, 132-133. If the legislature has delegated a field of regulation to a state board or agency the state has preempted the field and any city ordinance dealing with the same subject matter is invalid. *State v. Brennan*, (1965), 3 Conn. Cir. 413, 216 A.2d 294, 296-297. Chapter 563 of the state statutes (Conn. Gen. Statutes, secs. 31-122 et seq., supra, p. xiv) is entitled "Fair Employment Practices" and under it discrimination in public and private employment is prohibited. Conn. Gen. Statutes sec. 31-122(c) and (f), 31-126(a) (c) and (e). Acts of prohibited employment discrimination may be rectified by the state's Commission on Human Rights and Opportunities in response to a complaint or on its own initiative and it may make

[9a] A Connecticut municipality is not a state agency. *Bridgeport v. Agostinelli*, (1972) 163 Conn. 537, 550, 316 A.2d 371.

remedial orders which may include *affirmative action* relief. Conn. Gen. Stat. secs. 31-125(e), 31-127, 31-128. The purpose of Chapter 563 was to delegate to the Commission the duty to eliminate employment discrimination which it may accomplish by initiating class wide complaints and provide for class wide relief. The Act is co-extensive with 42 USC sec. 2000e-2. *Pik-Kwik Stores v. Commission on Human Rights and Opportunities,* (1976), 170 Conn. 327, 330-331, 368, A.2d 1210; *Groton v. Commission on Human Rights and Opportunities,* (1975), 169 Conn. 89, 99-100, 362 A.2d 1359; *Veeder-Root Co. v. Commission on Human Rights and Opportunities,* (1973) 165 Conn. 318, 327-330, 334 A.2d 443. Thus, the field of rectifying employment discrimination on a class wide basis by providing for affirmative relief in the nature of racial preference hiring has been preempted by the state abrogating all city ordinances dealing with the subject. *Midwest Employers Council, Inc. v. City of Omaha,* (1964), 177 Neb. 877, 881-888, 131 N.W. 2d 609 (Omaha's ordinance prohibiting employment discrimination was invalid since city had no power to legislate on fair employment practices and power concerning labor relations and practices including civil rights lies in the state not in a municipality); *Associated Gen., ETC v. San Francisco Unified SCH.,* (CA 9th, 1980), 616 F.2d 1381 (a school board's affirmative action policy lacked legislative authorization and could not be legally imposed); *Matter of Broidrick v. Lindsay,* (1976), 39 N.Y. 2d, 641, 648-649, 350 N.E. 2d 595 (Mayor of NYC's affirmative action plan regulations held invalid as unauthorized under the law);[10] *Lige v. Town of Montclair,* (1976), 72 NJ 5, 367 A.2d 833 (a racial hiring quota for Town of Montclair imposed by state agency held to be in violation of

[10]*Broidrick* was followed by *Fullilove v. Beame* (1979) 48 N.Y.2d, 376, 398 N.E. 2d, 765 and *Fullilove v. Carey,* (1979) 48 N.Y. 2d 826, 399 N.E. 2d 1203 (affirming 62 A.D. 798, 406 NYS 2d 888). *Beame* held that NYC Mayor's mayoral order as well as regulations were invalid as in excess of legislative authorization and in *Carey* the Governor's executive order requiring contractors to undertake programs of affirmative action was ruled invalid as being in excess of authority.

state constitution prohibiting discrimination); *Hull v. Cason*, (Cal. Ct. App., 1978) 88 CA 3d 768, 151 Cal. Rptr. 438 (California anti-discrimination statutes would invalidate fire department affirmative action plan); and, see, *Hiatt v. City of Berkeley*, (Cal. Ct. App., 1979) 88 CA 3d 503, 151 Cal. Rptr. 895 (Berkeley's affirmative action plan held unconstitutional) and *Brunetti v. City of Berkeley* (U.S.D.C.N.D. Cal., 1975) 12 FEP Cases 937 (same result).

The Plan sets a 15% minority membership and employment goal for *private* as well as public construction projects for those doing business with the City. (App. A86-87). In attempting to regulate private (as well as public) construction projects, the City used its contracting policy to promote an extrinsic social policy for which there was no grant of legislative power. *Matter of Broidrick*, supra, p. 648.

In short, the City had no power to legislate in regard to the employment practices of privately owned contractors or the training, membership, employment or referral practices of unions in order to provide affirmative relief for minorities.

C. THE CITY'S LACK OF AUTHORITY TO ADOPT THE ORDINANCE AND PLAN IS A THRESHOLD STATE LAW ISSUE WHICH THE COURT ERRONEOUSLY ABSTAINED FROM RESOLVING.

Both in *Regents of State University of California v. Bakke*, (1978), 438 US 265 and in *Fullilove v. Klutznick* (1980) 100 S.Ct. 2758, it was indicated that a *threshold* issue in determining the legality of racial preference legislation is whether the promulgating body possessed

the requisite authority to enact such legislation. Since resolution of such an issue is a necessary predicate to an intelligent resolution of the ultimate question of whether the means adopted to redress identifiable employment discrimination passes constitutional muster the threshold issue *must* first be resolved. *Cuyler v. Sullivan*, (1980), 100 S.Ct. 1708, 1715, n. 6. The threshold issue of the City's authority to adopt its Ordinance and Plan was raised below. (supra, 10-11) The Court of Appeals ignored[11] that fundamental claim and dealt first and last with the ultimate question. It was an erroneous exercise of judicial power for the Court of Appeals to so abjure its proper judicial function; *Barr v. Matteo* (1957), 355 U.S. 171-173; *Associated Gen., ETC. v. San Francisco SCH.*, (CA 9th, 1980), 616 F.2d 1381, 1384; unless the *absention doctrine* or a proper exercise of its *pendent jurisdiction* over state-law questions permitted it to refrain from resolving the state-law issue and proceed directly to the ultimate constitutional question without remitting the former to the State Court or resolving it itself. There was error either because the absention doctrine required state court remission; *Railroad Commission of Texas v. Pullman*, (1941), 312 U.S. 496, 498-501; *City of Chicago v. Fieldcrest*, (1942), 316 U.S. 168-173; or because pendent jurisdiction principles required the appeals court to resolve the issue. *Associated Gen., ETC.*, supra. In failing to properly apply either the *absention doctrine* or its pendent jurisdiction, the Court of Appeals denied to plaintiff its day in court in violation of Due Process. Compare, *Lutcher v. Moore Lumber Co.*, (1910), 217 U.S. 257 (CA denied plaintiffs their day

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[11]The Court of Appeals merely stated that the City's Council was a competent and responsible legislative body citing no Connecticut Constitutional provision, legislation or case law. (App. A11) This does not qualify as a "resolution" of the basic issue. Compare the extensive discussion of such a threshold issue in *Associated Gen., ETC. v. San Francisco Unified SCH.*, (CA 9th, 1980), 616 F.2d 1381.

in court when it refused to rule on issue properly before it.)[12]

D. THE DESTRUCTION OF THE UNION'S NON-DISCRIMINATORY OUT-OF WORK LIST VIOLATED NATIONAL LABOR POLICY.

A seniority system which applies to all races and ethnic groups, is consistent with NLRB precedents, does not have its genesis in racial discrimination and which was negotiated and has been maintained free from any illegal purpose is lawful, does not violate Title VII, and is protected by 42 USC §2000e-2(h) (supra, p. xiii). *International Brotherhood of Teamsters v. United States,* (1977), 431 U.S. 324. A seniority system allots to employees improving employment rights as their relative lengths of pertinent employment increase. *California Brewers Association v. Bryant,* (1980) 444 US 598, 605-606. A referral system, as does a seniority system, allocates entitlements to scarce benefits since it determines who gets an available job. *NLRB v. Houston Chap. Assoc. Gen. Con. of America, Inc.*, (CA 9th, 1965), 349 F.2d 449, 452, cert. den. 382 U.S. 1026 (a hiring hall provides for employee security); see, *Franks v. Bowman Transportation Co.*, (1976), 424 U.S. 747, 766. A seniority system also includes ancillary rules which need not, in and of themselves, operate on a factor involving passage time but which accomplish necessary functions connected with the system. *California Brewers Association v. Abram Bryant,* supra, 607-608.

The Union's referral system divides workers into four groups ranked primarily according to length of

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[12]In addition, said Due Process violation was inconsistent with standards 3.11 and 3.36, *Standards Relating to Appellate Courts, ABA Commission on Standards of Judicial Administration, Approved Draft,* which require an appellate court in a full written opinion to meet in a *candid* fashion, all the issues presented in cases of importance.

work experience. (App. A110) Referrals from each group are made in the order of an applicant's place on an "Out of Work List." (App. A112) This grouping provides for employee security and allocates entitlements to scarce benefits and it qualifies as a seniority system. The rule that referrals within a grouping are to be made from the "Out of Work List" is an ancillary one which is a necessary part of the system within the meaning of *California Brewers Association*, supra. There was no evidence presented, claim made or issue pursued before any of the courts below, to the effect that said system did not apply alike to all races and ethnic groups, that it had its genesis in racial discrimination or that it was negotiated or maintained with an illegal purpose.[13] The Union's referral system was valid under the federal labor laws. *Interstate Electric Company*, (1977), 227 NLRB 1996 (No. 291);[14] *Teamsters Local v. Labor Board*, (1961), 365 U.S. 667. It was a non-discriminatory referral system which could not be set aside absent specific Congressional authorization. *Teamsters Local v. Labor Board*, supra. There being no such authority granted, the district court and the Court of Appeals had no authority to invalidate the Union's Out of Work List. *United States v. East Texas Motor Freight System* (CA 5th, 1977), 564 F.2d 179, 185 (seniority system could not be set aside to satisfy governmental order which, in effect, declared unlawful what Title VII made lawful on the theory that it was a barrier to minority movement to jobs); *Southbridge Plastic Div. v. Local 759*, (CA 5th, 1978), 565 F.2d 913 (conciliation agreement could not override non-discriminatory seniority system since that would, inter alia, conflict with NLRA).

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[13]The district court disclaimed any intention to imply that the Union in operating its hiring hall sought to thwart the City's affirmative action plan. (App. A48 n. 17)

[14]NLRB's analysis as to an aspect of the referral system not at issue in our case was rejected in *Robertson v. NLRB* (CA 10th, 1979) 597 F.2d 1331. But in *Construction Building Materials & Miscl. Driver's Local No. 83*, (1979) 243 NLRB No. 26 at n. 8, 1979-80 CCH NLRB par. 16003, the NLRB disagreed with the 10th Circuit's holding and adhered to its position in *Interstate*.

The Plan, itself, provides that "It is not the intent of this Agreement to interfere with any bona fide seniority system which does not perpetuate past discrimination." (App. A103) The City's action, approved by both lower courts, is in violation of that provision and the national labor policy discussed above.

E. THE CITY'S 15% MINORITY MANNING REQUIREMENT WAS A MEANS TO CONFER A RACIAL PREFERENCE AS AN END IN ITSELF AND BOTH ON ITS FACE AND AS IMPLEMENTED IT WAS IN VIOLATION OF EQUAL PROTECTION.

1. Invalid On Its Face

The Plan required that each craft would make a good faith effort over a *five*-year period[15] to achieve in regard to the qualified minority labor force in the Hartford Labor Market Area (hereinafter referred to as "Region") concerning public and private construction projects a goal of minority training, membership and employment to at least 15% (hereinafter the "Regional Goal."). (App. A83-86) This Regional Goal was to overcome the effects of discrimination which the Ordinance identified as existing on a Region-Wide basis. (App. A71) The Hartford Labor Market Area consisted of Hartford and 23 surrounding municipalities. (App. A84).

The Plan also required a 15% minority manning level (on the basis of manhours) on City of Hartford construction projects. (App. A86) This 15% manning requirement was not a function of or correlated with the

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[15]The Plan provides that achievement of the 15% goal, after consultation between the City and affected parties, shall be set at no less than 1 year and no more than 5 years, as determined by said consultation. (App. A86). There was no showing that the goal as set was to be achieved in less than 5 years. (App. A31).

Regional Goal or with manning levels existing in the other 23 municipalities. Even if a contractor or union was in strict or in excess compliance with the Regional Goal said contractor or union still could be in momentary non-compliance with Hartford's 15% manning requirement because of a temporary inability to supply to Hartford projects sufficient minorities because of their prior utilization elsewhere in the Region or because of their location on a non-discriminatory referral list. To punish such a momentary lapse could only be for a purpose to hire on the basis of race as an end in itself. Even if it is assumed that a local manning requirement could have a rational relationship to the achievement of the Regional Goal in order for it to have any possible chance of doing so it at least would have had to be applied on an across-the-board basis in all of the 24 municipalities in the Region and not solely in Hartford.[16] The lower courts' approval of the Ordinance and Plan, if upheld, would mean that the other 23 municipalities in the Region could each adopt separate Regional Plans[17] each containing its own local manning provision. Even if each of the 23 municipalities was to set its manning level as low as 3% any contractor or union operating on a Region-wide basis would be contending with an aggregate minority manning quota so far in excess of the Regional Goal that it could not possibly bear any rational or reasonable relationship to it.[17a]

The flaw in the 15% Hartford manning provision was that in regard to it the Plan treated Hartford as if

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[16] Although the Plan focused on a Regional remedy and permitted other towns to join it [App. A93] there was no showing that any other town, city or municipality had ever joined the Plan. Also, the Plan made no provision for an adjustment of the 15% Hartford manning level depending on the actual level of minority utilization in the remaining 23 municipalities in the Region in regard to public or private construction projects or in regard to private construction projects in Hartford.

[17] Also, each could arrive at its own definition of what towns should be part of the "region."

[17a] E.g., 15% + (3% x 23) = 84%.

it was the only employer (public or private) in the Region.

2. Invalid As Implemented.

The Union was certified under the Ordinance and Plan on October 31, 1975 and was found by the City to be in violation of the Ordinance and Plan on July 7, 1977, more than three years prior to the date by which it was to achieve the Regional Goal. Apart from the City's objection to the Out of Work List, there was no evidence, claim or issue before either of the lower courts that the Union had failed to satisfy its affirmative obligations under the Ordinance or Plan to achieve a level of minority membership and employment consistent with the Regional Goal.[18] Thus, there was no dispute that the achievement by the Union of a 7.45%[19] minority membership was, at the time in question, in satisfactory fulfillment of the Regional Goal. In these circumstances, the only complaint the City could make and, in fact, the only complaint it did make against the Union was that the Union's then interim minority referrals (from its satisfactory complement of minority and non-minority workers) did not then place on City project jobs a sufficient number of minority workers.[20]

Job layoffs from an ever changing number of contractors occur at sporadic times and in unpredictable

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[18]It should be noted that the City's Plan attempts to remedy minority problems in regard to entrance aspects of the craft employment field, such as, training and apprenticeship programs. (App. A94-98). There was no allegation, issue or proof before the lower courts that that Union was not in full compliance with those aspects of the Plan.

[19](App. A11)

[20]The City made no complaint below that the contractors were not fulfilling their affirmative action plan requirements in any respect except in regard to the Union's operation of the Out of Work List.

numbers. Because of this, minorities are and will always be unevenly distributed on the Out of Work List even if the Union had a 15%, 20%, 30%, 40% or 50%, etc., minority membership or applicant pool and it would be inevitable that at some isolated interval of time such as the one seized upon by the City it would not be able to refer enough minorities to City jobs to satisfy whatever was the City's minority manning requirement unless the Union abandoned the chronological referral of its listed workers. Since the "deficiency" would arise even where a union had been fulfilling its Regional obligations, as here was the case, the purpose of the City's objection and the only result it could have accomplished would be to require the Union to utilize a racial classification in referrals solely as a means to confer a racial preference and not to eliminate traditional patterns of racial discrimination the City had found to exist in the Region. "Such a purpose plainly would be unconstitutional." *Fullilove v. Klutznick,* (1980), 100 S.Ct. 2758, 2790 (J. Powell).

United Steelworkers of America v. Weber, (1979), 443 U.S., 193, does not apply to our case because our case involves state action.[21] Nevertheless, it was held in *Weber* that although a [private] employer is free to achieve a racially balanced workforce by racial preference methods, once it has achieved that goal, it may no longer discriminate in order to maintain a racial balance. In our case, there was no complaint or issue below that the Union had not achieved a racially balanced workforce fulfilling, at that time, the Regional Goal. Thus, any attempt by the City to maintain a racial balance on City construction projects was solely an end

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[21]The Court of Appeals erroneously implied [App. A18] that the plaintiff agreed that the *Weber* ruling permitting a private employee to adopt an affirmative action program required the same result in regard to a racial preference plan adopted by a public body. The plaintiff had made no such concession. (P's Court of Appeals brief, pp. 43-44).

of itself, a requirement to hire or refuse to hire on the basis of race. Any attempt by the City to do so involved state action not precisely tailored to serve any compelling governmental interest and was contrary to Fourteenth Amendment requirements. *Regents of the University of California v. Bakke*, (1978), 438 U.S. 265; *Fullilove v. Klutznick*, (1980), 100 S.Ct. 2758, 2772, 2778-2779, 2790; see *Truax v. Raich* (1915), 239 U.S. 33 (a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien's right to work).

It was undisputed that the Union had been able to satisfy the City's 15% manning requirement when the Union had previously referred minorities out of chronological turn. (App. A62) Thus, there was no need for nor was there any claim or issue before the lower courts that the Union's complement of minorities in general or the number of minorities on the Out of Work List in particular was insufficient to satisfy the City's 15% manning requirement. For that reason there was no claim or issue below that the Union should have engaged in any means to satisfy the 15% manning requirement other than to jump the minorities on the List in preference to senior non-minorities on the List. The "solution" invented by the Court of Appeals was that the Union should have recruited other unlisted unemployed minority electricians and that they should be referred. The contention is that the latter referrals would be non-objectionable because they "may" have been out of work longer and "perhaps" no union member would be chronologically jumped over. (App. A16). The infirmity of this "solution" is adequately pointed out in the dissent.[22] (App. A25-26) Ironically, the "solution" would let the present minorities on the list remain

[22] Also, contrary to the Court of Appeals contentions (App. A12-13) the Union's list was open to non-minorities, non-minorities knew about the list, and the Union did not restrict its list to members. There was no evidence or claim presented below which supported the Court's contentions. (App. A26, 32, 48 n. 17, 109).

where they were and both they and the listed "senior" non-minorities would be bypassed in favor of "new" minorities to be referred first to City jobs. The "solution" inferentially accepts as a basic premise that it was legally improper to "jump" the lower listed minorities but not legally improper to let previously unlisted minorities "jump over" all of the members on the List including the listed minorities. The illogic is self evident. Neither a purpose to overcome alleged vestiges of previously identified discrimination nor any other compelling state interest is served by preferring one group of minorities over another group belonging to the same minority.

REASONS FOR GRANTING THE WRIT

1. It is important for this Court to settle the question of whether a City may legislatively adopt an affirmative action plan setting goals for region-wide employment of minorities in regard to public and private construction and require preferential hiring of minorities for said City's construction projects where there is no particularized finding of employment discrimination by contractors or unions affected by the plan. That question continues to remain open after *Weber* and *Fullilove* and its resolution is necessary for the guidance of affected members of the construction industry and its employees of all races and sexes and to inform them of what expectations they may have with regard to employment opportunities.

Fullilove did not rule on the scope of authority of a subordinate governmental body of a state to rectify the equivalent of societal employment discrimination nor did it deal with governmentally mandated minority hiring preferences or the implementation thereof. Our case presents issues which are next for resolution in a logical progression from those dealt with in the prior cases. The lower courts, herein, mistakenly relied (App. A11-12, A37) on Justice Powell's comment in *Bakke* that in *Contractors Association of Eastern Pennsylvania v. Secretary of*

Labor (CA 3d, 1971), 442 F.2d 159, cert. den. 404 U.S. 854, and *Associated General Contractors of Massachusetts, Inc. v. Altschuler,* (CA 1st, 1973), 490 F.2d 9, cert. den. 416 U.S. 957, the circuit courts upheld racial preference employment plans based on generalized findings of past discrimination. In *Contractors* the federal *Department of Labor* under the authority of Executive Order No. 11246 as a basis for the promulgation of the Philadelphia Plan, made findings as to *six specific trades* and the plan applied only to those six trades. 442 F.2d 159, 163. The extensive nature and specificity of those findings are detailed in 1970 *Wisconsin Law Review* 341, at 368-373. In the *Associated* case the plan in question was imposed not by a subordinate governmental subdivision of a state, but by the *Commonwealth of Massachusetts* which found minority underrepresentation in *19 specific unions.* 490 F.2d 9, 13. Neither of the above two cases support judicial approval of a conclusionary non-particularized finding made by a subordinate governmental body such as the City of Hartford as a justifiable basis for the City's Ordinance or Plan.

2. The type of implementation complained of, in this case, is that which the facts in *Fullilove* did not reach but left for resolution on another day. That day has arrived. It should be determined whether the ruling below falls on the impermissible side of the line left undefined in *Weber* and *Fullilove.* If the ruling below is left unreviewed, it together with *Fullilove* will lead to a proliferation of similar racial preference hiring plans at all levels of government unrestrained by any realistic limit. Judge Nickerson stated that such programs may be intended [i.e., there is liberty to adopt such programs] to achieve a moral equality rather than as deferred recompense for past injustices (App. A9).[23] That admission candidly

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[23]See, *Contractors Ass'n of Eastern Penn. v. Secretary of Labor,* (CA 3d 1971) 442 F.2d 159 at 176 where the court stated "The Plan does not impose a punishment for past misconduct. It exacts a covenant for present performance."

reveals the policy ground for the decision below. Unimpressed by the holdings of this court denouncing governmental impediments established on the basis of guilt by association the court below permits that concept to have full sway as a device to achieve "moral equality." A governmental entity relying on the ruling below may now declare that society as a whole is "guilty" of discrimination and, therefore, that every employer from the most simple to the most sophisticated enterprise shall be subjected to racial hiring requirements no matter how "innocent" he may be because he *is guilty* of *belonging* to a society where others may have discriminated. It is important for this Court to rule whether or not there is any stopping place along this extraordinary road. See, *Truax v. Raich*, (1915), 239 U.S. 33.

3. The destruction of the Union's Out of Work List conflicts with other rulings by this Court and other circuits and conflicts with national labor policy as discussed above. (supra, 19, 20). It is important for the guidance of the many unions across the nation which use such a referral system previously deemed and ruled to be perfectly legal to know whether their similarly bargained for benefits are now in unrestrained jeopardy.

4. Equally as important for resolution is the conflict between the Court of Appeals ruling and the *Pullman* abstention doctrine or the proper implementation of the pendent jurisdiction doctrine. The opinion below enigmatically fails to locate the source of the City's authority to adopt its Ordinance and Plan and fails to seek any resolution of that question in the state court. This failure to resolve a threshold issue conflicts with *Bakke, Fullilove* and with *Associated Gen., ETC.*[24] and raises a question of whether such a ruling is premature. It if is premature then it is important for this court to so label it so it will not mistakenly be accorded precendental value.

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[24](CA 9th 1980) 616 F.2d 1381.

5. This petition for certiorari raises questions that bear a close similarity to issues already pending before this Court in No. 79-1213, *Minnick v. California Department of Corrections,* petition filed February 6, 1980, certiorari granted, July 2, 1980. In *Minnick*, two of the questions that are raised concern the power of a state agency to voluntarily establish goals, set aside positions and grant preferences for hiring of minorities to the detriment of other applicants and employees based on conclusionary allegations of discriminatory impact of its past policies and practices on minorities. Obviously, those issues have been deemed to be sufficiently important to merit this Court's consideration. Also, there are now pending before this Court petitions for cetiorari in No. 79-1080 *Detroit Police Officers Ass'n v. Young* (pet. cert. filed 1/10/80); No. 79-1061 *Maehren v. City of Seattle* (pet. cert. filed 1/5/80); and No. 79-1996 *District Attorney for County of Sacramento v. Sacramento Civil Service Commission* (pet. cert. filed 6/18/80); which have not been acted upon and in which issues similar to those presented in this case have been raised.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

/s/ William S. Zeman

William S. Zeman

and

/s/ Joel M. Ellis

Joel M. Ellis

both of

18 North Main Street
West Hartford, Connecticut 06107
Tel: (203) 521-4430
Counsel for Petitioner

Office-Supreme Court
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MAY 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-833

In The

Supreme Court Of The United States

OCTOBER TERM, 1980

LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

v.

CITY OF HARTFORD, CITY MANAGER OF THE CITY OF HARTFORD, COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD, CONTRACT ENFORCEMENT COMMITTEE OF THE CITY OF HARTFORD, AND RONALD FLETCHER, INDIVIDUALLY AND AS SENIOR FIELD REPRESENTATIVE OF THE COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

WILLIAM S. ZEMAN
JOEL M. ELLIS
18 North Main Street
West Hartford, Connecticut 06107
(203) 521-4430
Attorneys for Petitioner

SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 22.6, the petitioner herewith submits its Supplemental Brief respectfully calling the Court's attention to a new case not available at the time of the filing of the Petition For Writ of Certiorari or the Reply Brief.

On April 14, 1981, the Connecticut Supreme Court decided the case of *New Haven Commission on Equal Opportunities Ex Rel John R. Washington v. Yale University,* and *The Visiting Nurses Association of New Haven, Inc. v. The Commission on Equal Opportunities of the City of New Haven,* Vol. XLII, No. 42 Conn. Law Journal, April 14, 1981, pp. 1-4. The cases were consolidated for purposes of the opinion. The latter is reproduced in the Appendix appended hereto.

(i) Summary of the new opinion.

The City of New Haven by ordinance created a Commission on Equal Opportunities to hear complaints regarding unfair employment practices. An ex-employee of Yale complained to the Commission that his termination from Yale was the result of racial discrimination and an ex-employee of Visiting Nurses made the same complaint in regard to her termination. In each case the Commission upheld the respective complaint and ordered reinstatement with back pay. Both matters came before the trial court and in each case the trial court upheld the employer's claim that the City of New Haven had only such powers as the state legislature had granted to it and that the legislature had granted no such authority as the City claimed to possess in said cases. On appeal to the Connecticut Supreme Court, the latter stated that the "issue is whether the City had the authority to grant the powers set out in the ordinance to the Commission. The powers specifically at issue are those granting authority to the Commission to determine matters of racial discrimination in employment,

and to issue and enforce orders to correct such discrimination." (App. 3A). The Connecticut Supreme Court *held* that there was no such legislative grant of authority to the City to create a Commission to resolve employment discrimination complaints. (App. 3A). In its discussion, the Connecticut Supreme Court stated, *inter alia*, "The power to form a commission to resolve employment discrimination complaints is a significant power which, however, is not necessary to protect the general welfare of New Haven residents, since state and federal laws provide alternative and adequate remedies to a New Haven resident who claims to have been the victim of discrimination." (App. 4A). Thus, the portion of the ordinance concerning the Commission's authority in employment discrimination was ruled invalid.

The ordinance also contained an Article II entitled "Hiring Practices in the Construction Trades." That article created a contract office within the Commission for the purpose of encouraging minority employment, eliminating discrimination, and achieving other objectives with respect to construction contracts awarded by the City of New Haven. In the *Yale University* case, the trial court had invalidated the entire ordinance including Article II. The Connecticut Supreme Court indicated, in effect, that Article II was not relevant to that case and that the ruling below should have been limited to the portion of the ordinance concerning employment discrimination.

(ii) Applicability to the Pending Petition

In the Court of Appeals, the petitioner herein pursued the claim that the City of Hartford had no authority to adopt an affirmative action plan ordinance or plan. The Court of Appeals ignored said claim. (Pet. p. 11). The petitioner also indicated, in effect, that it had brought to the attention of the Court of Appeals the trial court decisions in *Yale University* and *Visiting Nurses* in an effort to convince the court to remit the above threshold state law issue to the state court for

resolution. The Court of Appeals declined to do so. (Pet. pp. 11-12).

In Part B of the Argument in the Petition (Pet. pp. 12-16), it is argued that the City possessed no authority to adopt its ordinance or plan. The argument is based on the same legal theory on which the Connecticut Supreme Court invalidated the employment discrimination portion of the City of New Haven's ordinance.

In Part C of the Argument in the Petition (Pet. pp. 16-19), it is argued that the City's lack of authority to adopt its ordinance and plan is a threshold state law issue which the lower court erroneously abstained either from resolving or remitting to the state court. The above cited new Connecticut Supreme Court ruling confirms the petitioner's claim that the threshold state law issue should not be left unresolved and that, if the federal court is not required to resolve it, the issue should be remitted to the state court.

The City might contend that the Connecticut Supreme Court's reversal of the trial court in the *Yale University* case as to its ruling encompassing Article II ("Hiring Practices in the Construction Trades") of New Haven's ordinance contradicts the above claim of the petitioner. However, the excising of Article II from the *Yale University* case was not a ruling on the merits but only an example of the Connecticut Supreme Court's adherence to the policy that a judgment to be valid must be within the essential issues raised by the pleadings. *Maltbie, Conn. Appellate Procedure,* 2d Ed., §64. Since an invalidation of Article II was not called for by the issues raised in the case the judgment was (partially) invalid.

Although it is still undecided in the Connecticut state courts whether the City of Hartford's affirmative action plan ordinance and plan constitute a valid exercise of municipal power, the ruling in *Yale University* and *Visiting Nurses* strongly indicates that were the matter to be presented to the state court the petitioner's claim would be upheld.

Respectfully submitted,

By /s/ William S. Zeman
William S. Zeman

and

By /s/ Joel M. Ellis
Joel M. Ellis

both of

18 North Main Street
West Hartford, CT 06107
Tel: 521-4430

Counsel for Petitioner

No. 80-833

In The

Supreme Court Of The United States

OCTOBER TERM, 1980

LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

v.

CITY OF HARTFORD, CITY MANAGER OF THE CITY OF HARTFORD, COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD, CONTRACT ENFORCEMENT COMMITTEE OF THE CITY OF HARTFORD, AND RONALD FLETCHER, INDIVIDUALLY AND AS SENIOR FIELD REPRESENTATIVE OF THE COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

VOL. XLII No. 42 April 14, 1981

CONNECTICUT REPORTS

SUPREME COURT

February Term, 1981

NEW HAVEN COMMISSION ON EQUAL OPPORTUNITIES EX REL. JOHN R. WASHINGTON *v.* YALE UNIVERSITY

THE VISITING NURSES ASSOCIATION OF NEW HAVEN, INC. *v.* THE COMMISSION ON EQUAL OPPORTUNITIES OF THE CITY OF NEW HAVEN

BOGDANSKI, ARMENTANO, SHEA, WRIGHT and DALY, JS.

Argued February 6—decision released April 14, 1981

Action, in the first case, for enforcement of an order of the plaintiff commission with regard to employment discrimination, brought to the Superior Court in the judicial district of New Haven and referred to *Hon. John R. Thim,* state referee; judgment for the defendant, from which the plaintiff appealed to this court. *Error in part; judgment modified.*

Appeal, in the second case, from an order of the defendant commission with regard to employment discrimination, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Kremski, J.;* judgment for the plaintiff, from which the defendant appealed to this court. *No error.*

John T. Grillo, special assistant corporation counsel, and *Clarine Nardi Riddle,* deputy corporation counsel, with whom, on the brief, were *Charles G. Albom,* corporation counsel, and *Leander C. Gray,* assistant corporation counsel, for the appellant (plaintiff in the first case and defendant in the second case).

Robert B. Snow, Jr., with whom, on the brief, were *S. Robert Jelley* and *Kenneth Rosenthal*, for the appellee (defendant in the first case).

David A. Reif, with whom, on the brief, were *John H. Peck, Jr.*, and *Linda Handman*, for the appellee (plaintiff in the second case).

BOGDANSKI, J. Because these two cases present the identical legal issue they are consolidated for the purposes of this opinion.

In *New Haven Commission on Equal Opportunities ex rel. John R. Washington* v. *Yale University*, the complainant, John R. Washington, was a computer operator employed by the administrative data systems of the defendant Yale University. After Yale University terminated his employment, Washington filed a grievance under Yale's grievance procedure claiming racial discrimination in the termination. After a hearing, the grievance panel concluded that there had been no discrimination. On February 24, 1977, Washington filed a claim with the plaintiff New Haven Commission on Equal Opportunities (commission). The commission held a hearing and, on June 8, 1978, ordered Washington reinstated with back pay.

On September 18, 1978, the commission instituted the present action to enforce its order, in accordance with § 12 1/2-7 (a) of the equal opportunities ordinance of the city of New Haven. As an affirmative defense, Yale alleged that the board of aldermen of New Haven lacked the power to adopt the ordinance in question and that the commission's action in the pending matter was a nullity. The trial referee (*Thim, J.*) agreed with this contention and rendered judgment for the defendant. The plaintiff then took this appeal.

In *The Visiting Nurses Association of New Haven, Inc.* v. *The Commission on Equal Opportunities of the City of New Haven*, Lillian Cowan, an

employee of the plaintiff Visiting Nurses Association complained that she was discharged because of her race. The commission, after a hearing, rendered a decision in her favor and ordered that she be reinstated to her former position with back pay. On appeal to the Superior Court judgment was rendered for the plaintiff, from which judgment the defendant has appealed.

The commission was created by an ordinance of the New Haven board of aldermen which provides that the commission may hear complaints regarding unfair employment practices and take the necessary steps to protect the constitutional rights, privileges and immunities of complainants.

Both the Visiting Nurses Association and Yale University contend that the city of New Haven has only such powers as the state legislature grants to it and that the legislature has made no such grant of authority. On the other hand, the commission argues that enacting the ordinance was a valid exercise of the powers of the city under the Home Rule Act, General Statutes §§ 7-194 (25) (26) and (29).

The issue is whether the board of aldermen of New Haven had the authority to grant the powers set out in the ordinance to the commission. The powers specifically at issue are those granting authority to the commission to determine matters of racial discrimination in employment, and to issue and enforce orders to correct such discrimination. We conclude that subsections 7-194 (25) (26) and (29) of the Home Rule Act do not authorize a municipality to create a commission to resolve employment discrimination complaints.

Section 7-194 of the General Statutes provides, in relevant part, that "all towns, cities or boroughs which have a charter or which adopt or amend a charter under the provisions of this chapter shall have the following specific powers in addition to

all powers granted to towns, cities and boroughs under the constitution and general statutes: . . . (25) To preserve the public peace and good order, to prevent and quell riots and disorderly assemblages and to prevent disturbing noises; (26) To make and enforce police, sanitary and other similar regulations and to protect or promote the peace, safety, good government and welfare of the town, city or borough and its inhabitants; . . . (29) To define, prohibit and abate within the town, city or borough all nuisances and causes thereof and all things detrimental to the health, morals, safety, convenience and welfare of its inhabitants and to cause the abatement of any nuisance at the expense of the owner or owners of the premises on which such nuisance exists."

It is settled law that as a creation of the state, a municipality has no inherent powers of its own. *City Council of the City of West Haven* v. *Hall,* Conn. (41 Conn. L.J., No. 42, pp. 8, 10) (1980); *Pepin* v. *Danbury,* 171 Conn. 74, 83, 368 A.2d 88 (1976); *New Haven Water Co.* v. *New Haven,* 152 Conn. 563, 566, 210 A.2d 449 (1965); *State ex rel. Coe* v. *Fyler,* 48 Conn. 145, 158 (1880). On the other hand, a municipality does have such powers as are necessary to enable it to discharge its duties and carry into effect the objects and purposes of its creation. *City Council of the City of West Haven* v. *Hall,* supra, 10; *New Haven Water Co.* v. *New Haven,* supra, 566. The power to form a commission to resolve employment discrimination complaints is a significant power which, however, is not necessary to protect the general welfare of New Haven residents, since state and federal laws provide alternative and adequate remedies to a New Haven resident who claims to have been a victim of discrimination.

In *City Council of the City of West Haven* v. *Hall,* supra, we held that § 7-194 (26) did not authorize a municipality to grant to its governing

or legislative body the power to issue subpoenas. Since § 7-194 (26) is not sufficient to grant the power to issue subpoenas, it is surely not sufficient to grant the power to create an equal opportunities commission. Similarly, the language of § 7-194 (25) and (29) cannot be given such an expansive construction.

Section 7-194 consists of a detailed enumeration of powers granted to municipalities. In *State ex rel. Barnard* v. *Ambrogio,* 162 Conn. 491, 497–98, 294 A.2d 529 (1972), we noted "[t]hat the legislature went to the extent of precisely enumerating fifty-seven specific powers without mentioning a civil service system indicates that it did not intend to grant the municipalities such a power by way of a charter adoption." It is generally held that the express enumeration of powers granted to municipalities constitutes an exclusion of all other powers not expressly delegated to them. 2 McQuillin, Municipal Corporations (3d Ed. Rev. 1979) § 10.23, p. 82. See also *State ex rel. Barlow* v. *Kaminsky,* 144 Conn. 612, 620, 136 A.2d 792 (1957) ("enumeration of powers in a statute is uniformly held to forbid the things not enumerated").

The commission contends that there is a presumption of constitutionality of a statute, and that the trial court did not give the present ordinance the benefit of this presumption. No such presumption can be involved here, since the ordinance is not being challenged on constitutional grounds. The issue here is purely a question of statutory interpretation. It is the general rule that an ordinance is presumed valid; where, however, the power of the municipality to pass the ordinance is not clear, no such presumption attaches. 56 Am. Jur. 2d, Municipal Corporations § 382.

Cases cited by the commission, e.g., *Figarsky* v. *Historic District Commission,* 171 Conn. 198, 368 A.2d 163 (1976), and *Murphy, Inc.* v. *Westport,* 131 Conn. 292, 40 A.2d 177 (1944), are inapposite. In

those cases the legislature had specifically delegated to the municipality the right to enact an ordinance of the type challenged. Those cases discuss whether the state's police power could regulate certain conduct. Here, the issue is whether the state has elected to retain that power or delegate it under General Statutes § 7-194.

The commission contends that Public Acts 1980, No. 80-403, now General Statutes § 7-148 (a) (27), §§ 7-148i through 7-148n,[1] which empowers municipalities to establish equal rights and opportunities commissions, expressly permits the commission to continue existing and thus recognizes and makes certain its prior legal existence. In *Hall,* we held that a specific grant of power presupposes that the power did not already exist somewhere else in the Home Rule Act. If the power to create the commission already had been delegated to municipalities under § 7-194, there would have been no need for Public Act 80-403. It should be presumed that a law was adopted in view of existing relevant statutes and that the legislature intended it to be read with them so as to constitute one consistent body of law. We may not presume that the legislature has enacted futile legislation or that a change in a law was made without a reason. *City Council of the City of West Haven* v. *Hall,* supra, 11.

In *Yale University* the trial court held that chapter 12 1/2 of the New Haven Code is invalid, while the court in *Visiting Nurses* apparently limited its ruling to the commission's authority in employment practices. Chapter 12 1/2 includes a separate article, "Article II. Hiring Practices in the Construction Trades," which creates a contract office within the commission for the purpose of encouraging minority employment, eliminating discrimination, and achieving other objectives with respect to construction contracts awarded by the city of New Haven. The provisions of the New Haven Code other than those relating to employment discrimina-

tion by employers having no contractual relationship with the municipality are not relevant to the present case. The code contains a general severability clause in § 1-6 as does the Equal Opportunities Chapter, § 12 1/2-33. We, therefore, limit this ruling to the ordinances relating to employment discrimination. *State* v. *Stoddard,* 126 Conn. 623, 633–34, 13 A.2d 586 (1940).

There is error in part; the judgment is affirmed except as to the holding of invalidity of the entire ordinance in *New Haven Commission on Equal Opportunities ex rel. John R. Washington* v. *Yale University.*

There is no error in *The Visiting Nurses Association of New Haven, Inc.* v. *The Commission on Equal Opportunities of the City of New Haven.*

In this opinion the other judges concurred.

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[1] "AN ACT EMPOWERING MUNICIPALITIES TO ESTABLISH EQUAL RIGHTS AND OPPORTUNITIES COMMISSIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) Any town, city or borough, by charter or ordinance, may adopt a code of prohibited discriminatory practices and may establish or designate a board, commission, council, committee or other agency to investigate any allegation of discriminatory practice. For the purposes of this act, "discriminatory practice" means a violation of sections 31-126; 36-437, 53-34, 53-35 and 53-35a of the general statutes.

Sec. 2. (NEW) Any board, commission, council, committee or other agency established or designated pursuant to this act may be given the following powers; (1) The power to issue subpoenas or subpoenas duces tecum, enforceable upon application to the superior court, to compel the attendance of persons at hearings and the production of books, documents,

records and papers; (2) the power to issue written interrogatories and require written answers under oath thereto, enforceable upon application to the superior court; (3) the power to hold hearings relating to any allegation of discriminatory practice which it has found reasonable cause to believe has occurred and to issue any appropriate orders; and (4) the power to petition the superior court for enforcement of any order issued by it upon a finding that a violation of the local code of prohibited discriminatory practices has occurred, including the power to petition the superior court for temporary injunctive relief upon a finding that irreparable harm to the complainant will otherwise occur.

Sec. 3. (NEW) Any complaint filed pursuant to this act shall be made under oath. No finding of a violation of a local code of prohibited discriminatory practices shall be made except after a hearing. The respondent at any such hearing shall be given reasonable advance written notice of the hearing, shall be entitled to be represented by counsel, and shall be permitted to testify and present and cross-examine witnesses. The decision resulting from the hearing shall be in writing and shall include written finding of the facts upon which the decision is based.

Sec. 4. (NEW) Any person aggrieved by any order of the board, commission, council, committee or other agency established or designated pursuant to this act may appeal to the state commission on human rights and opportunities. Any such appeal shall be filed within thirty days of the mailing of the written decision.

Sec. 5. (NEW) Any action by the state commission on human rights and opportunities which involves the same parties and subject matter as an action filed with a local commission on equal rights and opportunities shall supersede the action brought with the local commission, except that the state commission on human rights and opportunities may admit into evidence the results of any investigation of a complaint filed with the local commission, or the decision entered on such a complaint by the local commission, and accord to such investigation or such decision the weight that may be appropriate under the facts and circumstances of the case.

Sec. 6. (NEW) Any board, commission, council, committee or other agency which has been established or designated to investigate allegations of discriminatory practices by the charter or an ordinance of any town, city or borough prior to the effective date of this act may assume the powers granted

to such agencies under this act if the charter or ordinance creating or designating such agency is not in conflict with the provisions of this act.

Sec. 7. Subsection (a) of section 7-148 of the general statutes, as amended by section 1 of public act 79-531 and section 1 of public act 79-618, is amended by adding subdivision (27) as follows:

(NEW) (27) Adopt a code of prohibited discriminatory practices. [The remaining sections of the Act are irrelevant to the subject matter of this action.]"

Supreme Court, U. S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-833

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

v.

CITY OF HARTFORD, CITY MANAGER OF THE CITY OF HARTFORD, COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD, CONTRACT ENFORCEMENT COMMITTEE OF THE CITY OF HARTFORD, AND RONALD FLETCHER, INDIVIDUALLY AND AS SENIOR FIELD REPRESENTATIVE OF THE COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX OF PETITIONER

WILLIAM S. ZEMAN
JOEL M. ELLIS
18 North Main Street
West Hartford, Connecticut 06107
(203) 521-4430
Attorneys for Petitioner

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 327 - September Term 1979
(Argued: February 11, 1980 Decided: June 13, 1980)
Docket No. 79-7253

LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Plaintiff-Appellant

v.

CITY OF HARTFORD, CITY MANAGER OF THE CITY OF HARTFORD, COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD, CONTRACT ENFORCEMENT COMMITTEE OF THE CITY OF HARTFORD, AND RONALD FLETCHER, INDIVIDUALLY AND AS SENIOR FIELD REPRESENTATIVE OF THE COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD,
Defendants-Appellees.

Before:
OAKES, VAN GRAAFEILAND, *Circuit Judges*, and
NICKERSON, *District Judge**

---

*United States District Judge for the Eastern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for District of Connecticut, M. Joseph Blumenfeld, Judge, for defendants, denying declaratory and injunctive relief.

Affirmed.

WILLIAM S. ZEMAN, ESQ. (Joel M. Ellis, Esq., of counsel) West Hartford, Connecticut for Plaintiff-Appellant

RICHARD F. BELLMAN, ESQ. (Eisner, Levy, Steel & Bellman, P.C. New York, New York; Hubert J. Santos, Corporation Counsel, Richard M. Cosgrove, Deputy Corporation Counsel, Hartford, Connecticut, of counsel) for Defendants-Appellees

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NICKERSON, *District Judge*

Plaintiff Local Union No. 35 of the International Brotherhood of Electrical Workers ("the Union") appeals from a judgment entered for defendants in the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, Judge. The defendants are the City of Hartford ("the City") and certain City agencies and officials responsible for enforcing its Affirmative Action Ordinance ("the Ordinance") and Affirmative Action Plan ("the Plan"). The Union is a labor organization representing all electrical workers who work for any employer with whom the Union has a collective bargaining agreement in Hartford County, five other Connecticut counties and one town in Rhode Island.

The complaint sought declaratory and injunctive relief against enforcement of the Ordinance and the Plan and alleged that as implemented they discriminate

against nonminority Union members on the basis of race and thereby violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2(c)), the Connecticut Constitution, and various provisions of the Connecticut General Statutes.

I

The events leading to the enactment of the ordinance and Plan commenced in 1970, soon after the City experienced serious disturbances in lower income minority neighborhoods. A group of community and civil rights leaders approached Deputy Mayor Nicholas Carbone, a member of the Court of Common Council ("the Council") since 1969, and chairman of its committee responsible for the City's then building program of over $100 million. The leaders protested the discrimination against minorities in the building trades and insisted that minority persons be given the opportunity to work on the expected projects. They asked Carbone to try to get the unions and the contractors to remedy the pervasive pattern of discrimination.

Carbone proceeded to bring together for negotiations the contractors, the unions, and the civil rights leaders. In September 1972, after negotiating for about one and a half years they finally agreed upon and made public an affirmative action plan providing for every good faith effort to achieve at least a fifteen percent level of minority and female employment. The plan was substantially the same as that later adopted as the Plan.

However, the agreed plan provided no method of enforcement, and no further action was taken to implement it. Indeed, only a few of the union locals subscribed to what their representatives had negotiated. In mid-1974 community and civil rights leaders again approached Carbone to complain. He then informed the building trades representatives that the City could not be a party to the exclusion of minority workers from City

jobs and that he would introduce legislation to implement the agreed plan. At his request representatives of the unions and the contractors helped draft the Ordinance.

On February 9, 1975, the Council, the City's chief legislative body, adopted the Ordinance, reciting as its purpose the ensuring of "equal employment opportunity for minority group persons and women" in the City's major construction contracts. Shortly thereafter, the Council, pursuant to the Ordinance, adopted the Plan.

II

The Ordinance defines "minority group persons" to include persons of Black, Puerto Rican, Spanish-American, Oriental or American Indian ethnic or racial origin and identity and women, and declares and finds, among other things, that

> "(a) Many contractors, labor unions, hiring halls, crafts and trades in the construction industry in the Greater Hartford area have discriminated, and continue to discriminate, against minority group persons and women.
>
> "(b) It is the intention of the City not to aid or abet such discrimination by awarding contracts to contractors who practice or have practiced discrimination against minority group persons and women, or who have subcontracted to, or engaged the services of, individuals and organizations that deny or have denied equal employment opportunity to minority group persons and women.
>
> "(c) The continuing effects of past and present discrimination against minority group persons and women by the construction industry may be prevented, mitigated and/or eliminated by an affirmative action plan.

"(d) There is a sufficient number of qualified group workers and women in the Greater Hartford Area to make such an affirmative action plan feasible and desirable."

The Ordinance requires all City construction contracts providing for payments of at least $10,000 to incorporate an Affirmative Action Plan to be adopted by the Council establishing reasonable minimum percentage goals for minority group and female employment in the construction industry. Principal responsibility for encouraging the employment of minorities and women is placed on the prime contractors. As a condition of acceptance of their bids they must obtain from their subcontractors and unions or other employment referral organizations affidavits agreeing to the Plan.

Unions, such as the Union here, which do substantial work outside the Greater Hartford Area and decline to adopt the Plan as a contractual provision can be certified as eligible to do city work if, among other things, they have accepted or will in the immediate future be accepting adequate minority and female participation in their operations and have submitted an affidavit stating that they agree with and will make a good-faith effort to comply with the Plan. A contractor or union previously certified but not in compliance with its affidavit is subject, after a public hearing to, among other things, possible decertification and preclusion from doing City work pending compliance or a good faith effort to comply.

The Ordinance also provides for the designation of one or more job referral banks, which are required to seek out and compile lists by trade of all qualified minority and female workers in the area and make those lists available on request to any contractor or union. The Council thereafter designated Project Leap of the Greater Hartford Urban League as a job referral bank.

The Plan provides that those agreeing to it will make every good faith effort to achieve employment of minority and female employees of at least fifteen percent on City projects and make a good faith effort to implement this goal on non-city jobs. The Ordinance defines good faith effort to mean "every reasonable attempt" to comply with the Ordinance and the Plan and "every possible measure" to achieve the level of participation of minority and female workers established by the Plan.

III

Incorporated in each of the union's collective bargaining agreements with the contractors is a so-called "Principle Labor Agreement" negotiated by the Union with the local chapter of the National Electrical Contractors Association, Inc. That agreement makes the Union "the sole and exclusive source of referral of applicants for employment" as electrical workers with the contractor and provides that applicants will be referred without discrimination against them "by reason of membership or non-membership in the Union."

The "Principle Labor Agreement" also provides that the Union will maintain a register of applicants for employment in four groups and an "Out of Work List" containing all applicants within each group in the chronological order of the dates they sign the list. Referrals are required to be made first from Group I in the order of the applicants' places on the list, then in the same manner successively from the other groups. Thus no applicants in a higher numbered group can be referred unless all those in lower numbered groups are working.

Group I includes those applicants who have had four or more years experience, are residents of the area, have passed a journeyman's examination given by the Union or one of its affiliates or have been certified by any Inside Joint Apprenticeship and Training Committee, and have been employed for at least one year of the

last four under a collective bargaining agreement between the Union and the contractor. Group II includes applicants with the same qualifications except that they are not required to be residents of the area or to have been employed under a collective bargaining agreement between the Union and the contractor. Group III includes those who have had two or more years experience, are residents of the area, and have been employed for at least six months in the last three years under a collective bargaining agreement between the Union and the contractor. Group IV includes applicants who have worked at the trade for more than a year.

IV

On October 31, 1975, the Union, which had collective bargaining agreements with numerous contractors having City contracts, was certified under the Ordinance, having submitted the requisite affidavit stating that it would not discriminate, would eliminate any effects of past discrimination, and would make a good faith effort to comply with the Plan. Despite the provisions of the collective bargaining agreements the Union had not maintained or made referrals from an "Out of Work List" for thirty years. However, in January 1976, after adoption of the Ordinance and Plan, the Union began to make referrals from such a list to all jobs including City contracts. The City first learned of this in January 1977 when several contractors advised the City that they were unable to meet the Plan's fifteen percent goal as to electrical workers. Investigation revealed that the Union was referring only those who had signed the list and in the order in which they had signed.

Although in theory non-union applicants were free to sign the list, in fact it contained only Union members. Furthermore, everyone on the list was in Group I. As of February 2, 1977, of the total Union membership of 550, 321 were not working. Of the 41 minority members (31 Black, 5 Spanish-surnamed, and 5 American Indian)

seventeen were not working. Of the 321 on the list of the first minority worker was number 85.

The City Manager ruled that the Union by making referrals only from the list in chronological order was not in compliance with the affidavit it had submitted to obtain certification. He referred the matter to the Contract Enforcement Committee of the Council. The Union thereupon commenced this action, which was stayed pending action by the Committee.

After holding hearings the Contract Enforcement Committee on July 7, 1977, concluded that the Union was not making a good faith effort to comply with its affidavit and that unless the Union within thirty days complied or showed a good faith effort to comply with the Plan, the Union would be decertified. Final action on the committee's ruling was held in abeyance pending a determination by the District Court.

In the hearings before District Court the parties agreed that there were no material issues of fact in dispute and made cross motions for summary judgment. Although the Ordinance defines the term minority group persons to include women, both parties treated the case as involving only alleged racial discrimination.

Judge Blumenfeld postponed a decision pending the decision in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978). After that decision was rendered the parties submitted further briefs. The court then granted defendants' motion on December 11, 1978, 462 F.Supp. 1271, and thereafter denied the Union's post-judgment motions.

V

The Equal Protection Clause of the Fourteenth Amendment prohibits the City from denying "to any person within its jurisdiction the equal protection of the laws." The central issue in this case is whether nonminority Union members are denied the equal protection of the laws if the City disqualifies the Union from participating in City construction work while the Union makes referrals only from the "Out of Work List" in chronological order.

It is well settled that laws which brand persons as inferior because of their color or race and thereby act as a stimulant to race prejudice are inconsistent with the Equal Protection Clause. Indeed, this was suggested as early as a century ago in *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). By outlawing segregation in 1954 the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), gave concrete expression to the constitutional mandate to eliminate such race consciousness and prejudice. However, few would claim that since that date the effort to eliminate discrimination has been an unqualified success. In fact the failure to change by racially neutral means the still widespread discrimination in our country had led to a variety of so-called affirmative action programs designed to advantage minority persons.

Though racially conscious, these programs may primarily be intended not as deferred recompense for past injustices but rather as the most, perhaps the only, effective way in the long run to end or to mitigate racial divisions and to bring about the moral equality of the races. Affirmative action programs to the degree they disadvantage nonminority individuals do so not on the theory that such persons are inferior but on the supposition that unless such programs are implemented there is faint hope of reducing race consciousness and of assuring that the time will come when the treatment of individuals will be based on their talent and not on their race.

Undeniably there are risks in affirmative action programs. In the short run they may exacerbate rather than diminish race consciousness. They may cause resentment. They may foster the belief that some need special advantages because they cannot succeed on their merits. This court has therefore proceeded cautiously, approving affirmative action plans where their purpose and need has been appropriately established, their goals have been reasonable in terms of the affected minority, and their tendency to reinforce race consciousness has been minimized.

A governmentally imposed affirmative action plan can only be sustained if its purpose and effect are to remedy the consequences of present or past discrimination. *Fullilove v. Kreps*, 584 F.2d 600 (2d Cir. 1978), *cert. granted*, 441 U.S. 960 (1979). Justice Powell indicated in *Regents of the University of California v. Bakke, supra*, 438 U.S. at 301-02 & n. 41, that judicial, legislative or administrative findings of the discrimination must support such a purpose. In the *Fullilove* case this court sustained under the Equal Protection Clause section 103(b)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), which mandates that at least ten percent of the monies appropriated pursuant to the statute shall be expended for minority business enterprises. The court held that Congress had the purpose of remedying the effects of past discrimination and had "sufficient evidence" of past discrimination in the construction industry. Earlier *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), sanctioned hiring quotas of Black and Puerto Rican policemen aimed at eradicating past discrimination where the District Court had found that the patrolman's examination had for many years resulted in individious discrimination.

In the present case the purpose of and need for the Ordinance and Plan were established beyond question. Previous efforts to mitigate or eliminate discrimination in the local buildings trades had clearly met with failure.

In the Ordinance the Council, a competent and responsible legislative body subject to political restraints, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), declared its purpose of ensuring equal employment opportunity for minority and female workers and made findings of past and present discrimination. Those findings were not attacked in the District Court. Indeed, when the contractors and the unions negotiated the voluntary plan and later assisted in drafting the Ordinance they acknowledged that minority workers were seriously under-represented in the building trades. That under-representation was documented in studies by the University of Connecticut, the Connecticut Labor Department and the City's Human Relations Commission. Moreover, racial discrimination in the construction trades on racial grounds has been found so often by the courts as to make it a proper subject for racial notice. *United Steelworkers v. Weber*, 443 U.S. 193, 198 n. 1 (1979).

Although only 7.45 percent of the Union's members are minority individuals and the percentage of blacks employed as skilled electricians in Connecticut actually decreased from 0.9% to 0.7% between 1960 and 1969, the Union claims that there was no legislative finding that it had discriminated in the past. The Union introduced no proof that it was an exception to the general finding. But in any event a valid affirmative action plan need not be based on a particularized finding of past discrimination by every employer or union affected. It is enough that there is a finding of discrimination in the industry concerned. To hold otherwise would enable parts of the industry to frustrate the plan by assigning various functions to those who had not previously discriminated. Other circuits have upheld affirmative action plans granting racial employment preferences where a legislative or administrative body charged with the responsibility made determination of past discrimination in the industries affected but did not make specific findings directed at those attacking the programs. *Contractors Association of Eastern Pennsylvania v. Secretary of*

Labor, 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971); *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974). These decisions were cited with apparent approval by Justice Powell in the *Bakke* case, 438 U.S. at 301-02.

Moreover, whether or not the Union discriminated in the past, to acquiesce in the Union's position in this case would be to permit perpetuation of discrimination. The Union, which for thirty years had not maintained an "Out of Work List," now insists that referrals must be made only from such a list in chronological order. The list contains solely Union members. Yet it is evident that there are other unemployed qualified and licensed electrical workers in the area, and the Council found that there were sufficient qualified minority and female workers to make feasible the fifteen percent goal of the Plan in respect to employees on City projects. Indeed, the union introduced no proof suggesting otherwise.

While the collective bargaining agreements between the Union and the contractors by implication gave non-members the right to sign the "Out of Work List," there is no showing that anyone not a Union member knew of the existence of the list. Even if a non-Union member had known of the list and had signed it, such a worker in all likelihood would not have been qualified to be included in Group I which had priority for referrals. To be listed in Group I an applicant must have been employed for at least one year of the last four under a collective bargaining agreement to which the Union was a party. For most if not all non-union workers, therefore, it would probably have been futile to sign the list. They would not have been referred for employment until all Union members were employed.

By making provisions for job referral banks the Ordinance contemplated that a union having a membership of less than fifteen percent minority and female

workers could comply with the Plan by referring qualified non-Union workers. Project Leap, the job referral bank designated by the Council, evidently had the names of such workers, for when the Union failed to refer minority electricians, the City advised one contractor that it was required to use other sources and should apply to Project Leap to "assure" compliance with the Plan. The fact that the Union list contains the name of not a single non-Union person indicates that the Union made no effort to recruit qualified non-union minority and female workers, from the job referral banks or otherwise, into its referral system. If the Union is permitted to restrict minority and female employment to its forty-one members, the rather modest goal of employing fifteen percent minority employees on City projects may be effectively frustrated.

The Union now suggests for the first time that the fifteen percent goal may be too high because it is in excess of the percentage of the minority population in the Greater Hartford Area. However, in the District Court the Union did not attack that goal as unreasonable. Nor did the Union make the contention below that the group from which construction workers might reasonably be drawn was less than fifteen percent minority and female or refute the legislative finding that sufficient qualified minority and female workers were available to make the hiring of fifteen percent minorities on City contracts feasible and desirable. Furthermore, the representatives of both the unions and the contractors agreed in 1972 that a fifteen percent goal was reasonable.*

Finally, we think that the implementation of the Ordinance and Plan as shown in this record is calculated

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* Whether it is reasonable to require that fifteen percent minority workers be hired on City projects is a question different from, although perhaps related to, the question of whether seeking to have fifteen percent minority membership in the Union is a reasonable goal. This opinion need not and does not reach the latter issue.

to attain the fifteen percent objective while causing a little resentment as possible. This case is not like those relied on by the Union.

In the *Bridgeport Guardians, Inc.* case, *supra*, while approving hiring quotas of Black and Puerto Rican patrolmen, this court disapproved the use of quotas for promotion to ranks above that of patrolmen. The court found that there was no justification for promotion quotas because the promotion examinations were not found to be discriminatory and the quota would have a "harsh" impact on the few persons who had embarked on a police career with the expectation of advancement and would "only exacerbate rather than diminish racial attitudes." *Id.* at 1341.

Similarly in *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), the court reversed the District Court's order that the New York State Department of Correctional Services promote to sergeant at least one Black or Hispanic employee for each three white employees promoted until the Blacks and Hispanics made up the same combined percentage of sergeants as they did of correction officers. The Court's opinion stated that the proof of past racial personnel was inadequate and that those bypassed for advancement would be "a small number of readily identifiably [sic] candidates for promotion." *Id.* at 429.

On the other hand, in the *Fullilove* case this court sustained the set aside of ten percent of federal public works money for minority businesses and deemed any resentment likely to be caused by the act to the minimal since the amount set aside was only .25 percent of the funds expended yearly on construction work in the United States, and the effects were not "identifiable," that is, "concentrated upon a relatively small, ascertainable group of non-minority persons." 584 F.2d at 607.

Similar criteria were used by Mr. Justice Powell in his opinion in the *Bakke* case finding invalid the

program of a medical school reserving sixteen of one hundred seats for disadvantaged minority students. While he approved preferences to minorities where competent and responsible public bodies made findings of past discrimination, he referred to the "deep resentment" likely to be aroused by all classifications based on race, 438 U.S. at 294-95 n. 34, and concluded that the exclusion of nonminority applicants from any competition for the sixteen seats would be viewed as "inherently unfair" both by the general public and by those who applied to admission to state universities. *Id.* at 319 n. 53.

The Union, citing these cases, contends that the Plan requires that minority Union members on the "Out of Work List" be "jumped over" the "readily identifiable" nonminority members on the list. This contention is based on the premise that this is the only way the Union can make a good faith effort to attain the fifteen percent goal.*

For reasons already discussed the premise is faulty. The Union can seek out and refer other qualified workers. Chronological referrals from a list including both Union and non-Union members and containing at least fifteen percent minority female persons might well have met the City's goal.

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* The Union points to a statement by a representative of the City's Commission on Human Relations at the hearing before the Contract Enforcement Committee that "My position was that in order to comply they would have to reexamine their rotation list and perhaps the rotation list should not be used.... My position was that the rotation list would have to be rethought and reexamined and, yes, minorities would have to be moved up." It is clear from the context of this statement that the representative of the Commission contemplated that the Union could go outside the "Out of Work List" to "move up" minorities. In any event the decision of the Contract Enforcement Committee decertifying the Union merely concluded that "use of the 'out of work' list" was clear evidence of lack of a good faith effort to comply.

Qualified minority and female workers who are not Union members may well have been out of work longer than any persons on the Union's list, and perhaps no Union member would be chronologically "jumped over" if referrals were made from a list including all those qualified to work. The court does not have before it a situation where referrals are made chronologically from a list containing all those qualified but less than fifteen percent minority or female persons. We need not rule on the validity of a jumping of minority and female over nonminority workers in such circumstances. Nor need we decide whether a non-minority Union member may enjoin the Union from referring out of turn a minority Union member on the present "Out of Work List."

Neither the decisions of this court nor the Supreme Court sanction the Union's frustration of the Plan through the expedient of restricting referrals to the Union list, indeed, for practical purposes, to its own membership, and then claiming that those few are readily identifiable. In instances in which the decisions disapproved racial quotas the list from which appointments could be made included all those legally qualified for the position. That is not the case here.

Resentment there may be if the Union is required to make inquiries of a job referral bank and to compile a list including at least fifteen percent minority and female workers. But the effect of such a requirement is not comparable to the effect of the direction of quotas for police promotion which this court disapproved in the *Kirkland* and *Bridgeport Guardians, Inc.* opinions or to the effect of the program rejected by Mr. Justice Powell in the *Bakke* case. Any indignation here can hardly be as intense or appear as plausible. There is no issue of preferring someone over another presumably more qualified, at least on paper. Nor has it been shown that in order to show compliance the Union must refer a minority Union member out of chronological turn.

For the foregoing reasons we hold that the Ordinance and Plan as implemented do not infringe the Equal Protection Clause. To accede to the Union's contentions would be to require the City to condone conditions the Equal Protection Clause was designed to end.

VI

The Union contends that the Ordinance and Plan are invalid because they are inconsistent with section 703(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(c), which provides in pertinent part that it shall be "an unlawful employment practice" for a labor organization to "fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status...as an applicant for employment, because of such individual's race, color, religion, sex, or national origin."

The argument is that the Plan and Ordinance violate this section by depriving nonminority and male workers of employment opportunities on the ground of race, of color, or sex. This contention is foreclosed by *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). There the Court had before it the language of section 703(a), 42 U.S.C §2000e-2(a) prohibiting, in terms practically identical to section 703(c), an employer from refusing to hire because of an individual's race, color or sex.

The Court held that the prohibition did not condemn all private, voluntary, race conscious affirmative action plans, and that a plan of an employer and a union was valid where it reserved for black employees 50% of the openings in an in-plant craft training program until the percentage of black craft workers in the plant was commensurate with the percentage of blacks in the local labor force. The Court noted that the plan, like Title VII

itself, was designed to break down old patterns of racial segregation and hierarchy. Moreover, it was temporary, did not unnecessarily trammel the interests of white employees, did not require discharge of whites and their replacement with new black hires, and did not create an absolute bar to the advancement of whites since half of those trained would be white.

The Ordinance and Plan before us have a less significant impact on nonminority workers than did the plan in the *Weber* case, and the Union has not suggested that we give section 703(c) a construction different than that given section 703(a).

The Union urges in addition that the Ordinance and Plan violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and the provision of 42 U.S.C. §§1981 and 1983. However, any claim under these sections presupposes a violation of the Equal Protection Clause or Title VII, and the Union has shown no such violation.

The Union also contends that the Ordinance and Plan prevent the Union from providing the equal representation to its members required by the National Labor Relations Act, 29 U.S.C. §158(b). But there is no violation of equal representation where a union complies with a valid affirmation action program.

VII

Finally the Union asserts that the Ordinance and Plan violate Connecticut constitutional and statutory law. The argument is based on the premise that any affirmative action program is prohibited by (a) Article First, section 20 of the Connecticut Constitution, providing for "equal protection" and against "discrimination" on the ground of religion, race, color, ancestry or national origin, and (b) Connecticut's "Fair Employment Practices" legislation, Chap. 563 Conn. Gen. Stat., admittedly intended to be coextensive with Title VII, 42 U.S.C. §2000e-2.

As the District Court observed, the Connecticut courts have held that the equal protection clauses of the Connecticut and United States constitutions have substantially the same meaning. *Snyder v. Town of Newton*, 417 Conn. 374, 381, 161 A.2d 770 (1960). The Union cites no authority to the contrary.

Nor does the Union point to any Connecticut decision suggesting that the Connecticut Fair Employment Practices act should be construed to have a meaning different from Title VII on which it was modeled.

VIII

We have considered the Union's other contentions and find them without merit.

The judgment is affirmed.

VAN GRAAFIELAND, *Circuit Judge* (dissenting):

In January 1977, the Mafco Electric Co. of West Hartford, Connecticut, laid off two of its employees. It discharged them, not because they were incompetent or derelict in their duties, but because they were white males. Had they been Spanish-Americans just immigrated from Cuba, Blacks recently arrived from Alabama, or white heiresses working for kicks, they would have continued to draw their paychecks. However, they were white males and so they lost their jobs. They were discharged in order that Mafco could comply with an "anti-discrimination" ordinance enacted by the City of Hartford.

Although official 1980 census figures have not yet been established, it is estimated that approximately 50 percent of Hartford's population are non-white and that

at least 50 percent are women. This means that approximately 25 percent are white males. The Hartford City Fathers have decided nonetheless that, insofar as the City is concerned, the non-whites and women are the minority group and the white males are the majority group.[1] They enacted an ordinance to ensure "equal employment opportunity" on city projects for the 75 percent of Hartford's citizens making up the "minority" group and to establish "reasonable minimum percentage goals" in the construction industry for that group. Although 15 percent was set as the basic minimum level for "minority" employment, the actual percentage goals are to be determined by the City Manager, using, among other criteria, the size of the qualified "minority" labor force in the Hartford Labor Market Area. Moreover, the adequacy of the goals so established is to be reviewed annually. As this Court proceeds to put its stamp of approval upon this program, it is appropriate, I think, that we pause briefly to take a look at where we are and where we are going.

We conclude, as we must, that affirmative action programs of this sort can no longer be justified as "deferred recompense for past injustices." There can have been no injustices against racial minority members who appeared on the scene no earlier than yesterday or against women whose interest in construction work is not of vintage character. Now, our support assertedly is based upon the desirability of bringing about what the majority describe as the "moral equality of the races." It is not too early - perhaps it is too late - to consider what is meant by "moral equality of the races" and to ask ourselves where the United States women fit into this "moral equality" picture. A look at history may furnish a helpful perspective.

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[1] Article X. §2-323 of the Hartford Code includes within the definition of "minority group persons" Blacks, Puerto Ricans, Spanish-Americans, Orientals, American Indians, and women.

In 1920, Hungary enacted a law known as Law XXV 1920, which provided among other things that the student bodies in the university should be proportioned by race so that the percentages corresponded with the racial percentages in the country as a whole.[2] In effect, this law gave Magyar students priority over Jews in admission to universities.[3] In 1941, Bulgaria enacted a Law for the Defense of the Nation (*Zakon za zashtitata na natsiiata, ZZN)* which limited the number of Jews in both schools and the outside economic world.[4] Article 25 of the Statute, which limited the number of Jews in various occupations, empowered the Cabinet to decide on the distribution of occupations in the country's professions and trades.[5] In 1887, a law was enacted in Russia limiting the number of Jews in various middle and higher schools to between two and fifteen percent.[6] In pre-Nazi Germany, Jews were permitted to attend universities and practice certain professions only in proportion to their numbers in the population.[7]

These European laws are well-recognized examples of *numerus clausus* legislation. Translated freely as "limited numbers," *numerus clausus* describes a situation once prevalent in several European countries in which Jewish participation in schools and occupations was limited by numbers of percentages or by relating Jewish participation to that of other races. It now

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[2] Vol. 8, *The Universal Jewish Encyclopedia,* 251, 252 (1942).

[3] P. Grosser & E. Halperin, *The Causes and Effects of AntiSemitism* 249 (1978).

[4] F. Chary, *The Bulgarian Jews and the Final Solution,* 1940-44 37-41 (1978).

[5] *Id.* at 42.

[6] Vol. 8, *The Universal Jewish Encyclopedia, supra,* at 251.

[7] *Id.*

appears that in cities such as Hartford the white male is about to inherit the role of the European Jew. As a number of Bulgarian Jews self-employed in commerce, credit, and insurance dropped from 4,465 in 1926 to 761 in 1942,[8] so will the number of white males employed in the Hartford construction industry drop if the *numerus clausus* of Hartford's affirmative action program continues in effect.

Moreover, with the adoption of affirmative action plans such as that of the City of Hartford, the day is not far off when *numerus clausus* will be applied not simply to white males but to all races, and to sexes as well. Combining Blacks, Puerto Ricans, Spanish-Americans, Orientals, American Indians, and women into one "minority group" gives substantial statistical support to those who favor affirmative action for minorities. No prescience is needed, however, to predict that the homogeneity of this minority group will not long endure. Blacks will not sit idly by should all affirmative action jobs be given to white women. Spanish-Americans will not remain passive if a disproportionate number of jobs is given to Blacks. They will each demand recognition for their own race as a separate minority group, and the inevitable result will be a *numerus clausus* for all groups. An employer will need a computer to unscramble the conflicting quota demands of race and sex groupings and a lawyer at his right hand to defend him against error.[9]

Men of good will look back with distaste upon the battle over immigration quotas that raged in Congress during the early 1920's. Those quotas, like affirmative action quotas, were concerned with racial balance. Immi-

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[8] F. Chary, *The Bulgarian Jews and the Final Solution*, 1940-44, *supra*, at 42n.14.

[9] *See, e.g.*, 29 C.F.R. §30.4(f); *Jefferies v. Harris County Community Action Assn.*, 48 U.S.L.W. 2732 (5th Cir. April 21, 1980).

gration quotas were established to preserve racial balance in the country as a whole;[10] affirmative action quotas are intended to create it in specific areas or occupations. The first immigration quota law, enacted in 1921, limited the number of any immigrating nationality to 3 percent of foreign-born persons of that nationality who lived in the United States in 1910.[11] Prior to the expiration of this law in 1924, Congress set about enacting successor legislation, and a dispute arose as to whether the 1890 census rather than the census of either 1910 or 1920 should be used as a basis for the new 2 percent quota. The Congressmen who wanted to restrict immigration from southern and eastern Europe favored the 1890 census because most immigrants from those areas arrived at a later date. Those who favored immigration from southern and eastern Europe argued for the 1910 or 1920 census.[12] The debate in Congress was acrimonious. Moreover, regardless of the facial arguments used, the fundamental issue was whether the quota of one nationality or another should be favored.[13] It was a dark chapter in our country's history but a chapter that will surely be rewritten if the use of *numerus clausus* or racial quotas in affirmative action programs is not restricted.

Following the enactment of ZZN, Bulgarian Jews received an occupational allotment of 21 doctors, 20 lawyers and 7 dentists.[14] When the day comes that similar allotments are made in this country, those who dream of

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10 *See* Committee on the Judiciary, *The Immigration and Naturalization Systems of the United States*, S. Rep. No. 1515, 81st Cong., 1st Sess. 430, 443 (1950).

11 *Id.* at 56.

12 *Id.* at 60.

13 *Id.* at 60-65.

14 *The Bulgarian Jews and the Final Solution.* 1940-44, *supra*, at 42.

an integrated society, free of racial controversy and animosity, will long since have had their dreams shattered. My brothers appear to take comfort in the fact that the present Hartford quota is only 15 percent. Apparently they believe that the "minority" which holds political power in Hartford will be content with that figure. However, that "minority" cannot help but know that, if a 15 percent quota is legal, so also is a 30 percent, a 50 percent, or a 75 percent quota. *See United Steelworkers v. Weber*, 443 U.S. 193, 208-09 (1979). Conceptually, there is no distinction in the figures. The only giant step has now been taken and judicially approved. From 15 percent to 75 percent is simply the continuance of a process already under way, and there is no logical stopping place in between.

The arguments against *numerus clausus* are not answered by saying that the framers of racial quota legislation are well-intentioned. The Inquisition itself was not evilly motivated. "If a religious, moral, or political purpose may exculpate illegal behavior, one might commit bigamy to avoid eternal damnation; steal from the rich to give alms to the poor; burn and destroy, not merely public records or perhaps buildings but even public servants as well, to implement a Utopian design." *United States v. Cullen*, 454 F.2d 386, 392 (7th Cir. 1971) (footnote omitted). It is by well-intentioned processes such as this, rather than by revolution, that individual rights and freedoms in a democracy are most likely to be lost.

The adverse effects of the discharge of the Mafco employees were not limited to the two men and their families. When Mafco laid off the two white male employees, it called upon appellant to replace them with two Blacks. However, the 1965 contract between appellant and Mafco, a copy of which was in the possession of the City since October of that year, provided that employees would be referred in the order in which they registered on an "Out of Work List." Although prior to the demand by Mafco the Union had jumped minorities

over whites in order to meet the demands of the Hartford Affirmative Action Plan, the Union discontinued this discriminatory practice upon the advice of its attorney. It was and is the belief of appellant's counsel that compliance with Mafco's demand would violate 42 U.S.C. §2000e-2, which makes it unlawful for a labor organization to fail or refuse to refer any individual for employment because of that individual's race, color, religion, sex, or national origin. The Common Council of the City of Hartford has in effect nullified this federal statutory enactment by legislatively declaring that the group constituting 75 percent of Hartford's population is a minority and that there has been discrimination against that minority in the construction industry.

The majority opinion implies that if appellant's membership included 15 percent of the "minority group" instead of 7 percent, the first minority worker would be transposed magically from 85th place to 1st place on the Out of Work List and the second minority worker would be alchemized from 94th place to 2nd place. Thus, no "bumping" or "leapfrogging" would be required in order to meet Mafco's demand for two Blacks. This suggestion is without mathematical support. Even if minorities made up 15 percent of the Out of Work List, the chances would always be about 7 to 1 against one of them being at the top and, if the statistical estimates of the writer's clerk are correct, about 49 to 1 against them being listed first and second. Moreover, the record discloses that the electrician whose name was on the bottom of the Out of Work List had to wait one and one-half years before he reached the top. This means that those whose names were at or near the top when Mafco asked for Black replacements were already out of work when the Union certified itself into the Hartford Plan in October 1975. There was no way in which the Union could have furnished Mafco with Black employees without leap-frogging them over white employees who had been waiting 18 months for work. The district court disposed of this problem very simply by holding that leapfrogging would not be "unduly bur-

densome" on the whites who were bypassed because they would only be delayed in finding employment, not permanently denied it. The majority wisely avoids comment on this holding.

It would have been better perhaps if the majority had also resorted to less conjecture and surmise in their attempt to mitigate the discriminatory effect of the bumping and leapfrogging, about which this Court long ago, expressed its concern. *See United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 659 (2d Cir. 1971). Statements that a union worker would "in all likelihood" not have qualified for Group I, that a job referral bank "evidently" had the names of non-union members, that by addition of non-union workers' names chronological referrals "might well have met the City's goals," and that qualified non-union workers "may well have been out of work" longer than union workers, none of which statements is supported by proof, do not seem quite appropriate in an action in which summary judgment was granted.

When Robert Murray, appellant's Business Manager testified before the Contract Enforcement Committee, the following colloquy took place:

> Q: And have you notified all non-Union members of the existence of this list?
>
> A: Oh, they know there is a list. I think the thing is everybody has gone out looking for a job everywhere they can get one.
>
> Q: And what steps have you taken to advise non-union members of the existence of this list?
>
> A: Oh, non-union members know that the list exists. They have come to this Union over the years. The fact is, people in the Union and those that are not members are practically giving up. We have people working for the City of

> Hartford, people traveling throughout the country. Anybody on the bottom of this list today, he is good for a year and a half.

If the Hartford Affirmative Action Plan is applied to appellant, Mr. Murray will have to amend the last quoted sentence by adding "unless that person is Black, Puerto Rican, Spanish-American, Oriental, American Indian, or a woman."

The Hartford plan is a far step removed from the early affirmative action plans in which we approved the "gingerly" use of quotas for the purpose of remedying the prejudicial effects of past discrimination against a true racial minority. With the addition of women to the so-called "minority group," quota allocations as between the "majority" and the "minority" will leave white males eventually with about a 25 percent allocation. This must be what my colleagues mean by "moral equality of the races."

Justice Mosk, writing for the dissent in *Price v. Civil Service Commission*, _____ Cal. 3d _____, 604 P.2d 1365, 161 Cal. Rptr. 475 (1980), has ably summarized why the path along which we are now traveling is leading us in the wrong direction. Although the writer of this dissent could repeat what Justice Mosk has said, he could not improve upon it, and therefore is content to simply express his adherence to Justice Mosk's views. For the good of our country, I hope that Justice Mosk and the writer are wrong. I believe, however, that history will prove us to be right.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Filed December 11, 1978

LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS	:	
v.	:	CIVIL NO. H-77-167
CITY OF HARTFORD, ET AL.	:	

RULING ON PENDING MOTIONS

This action represents a challenge to the implementation of the defendant City of Hartford's Affirmative Action Plan, which seeks to achieve 15 percent minority group employment on construction projects awarded by the City. Plaintiff Local Union No. 35, International Brotherhood of Electrical Workers (hereinafter the Union or Local 35) seeks declaratory and injunctive relief invalidating the Affirmative Action Plan (hereinafter the Plan) to the extent that it requires the Union to give preference to minority workers when referring workers for employment. The Union contends that the Plan mandates discriminatory treatment of nonminority employees on the basis of race, in violation of state and federal statutory and constitutional standards.

The plaintiff Local 35 represents all electrical workers who work for an employer with whom Local 35 has a contractual relationship in various counties, including Hartford County, in Connecticut. The defendants are the City of Hartford (hereinafter the City) and several City agencies and officials having responsibility

for enforcement of Hartford's Affirmative Action Plan. This case is now before the court on cross-motions for summary judgment.

I. Background

A. The Affirmative Action Plan

On February 9, 1975, the Court of Common Council, the City of Hartford's chief legislative body, adopted the Hartford Affirmative Action Plan Ordinance (hereinafter Ordinance), Revised Code of Hartford §§2-321 to 2-333. The stated purpose of the Ordinance is to insure:

> "equal employment opportunity for minority group persons and women in all phases of construction work, including the bidding process, performed pursuant to major contracts offered and awarded by the city under the provisions of the Charter and this Code."

Ordinance §2-321. The Court of Common Council declared in the Ordinance that legislative action was required due to a pattern of past and continuing discrimination among contractors and labor unions in the construction industry in the Hartford area. The Court of Common Council declared and found, *inter alia*, that:

> "(a) Many contractors, labor unions, hiring halls, crafts and trades in the construction industry in the Greater Hartford Area have discriminated, and continue to discriminate, against minority group persons and women.
>
> "(b) It is the intention of the city not to aid or abet such discrimination by awarding concontracts to contractors who practice or have practiced discrimination against minority group persons and women, or who have subcontracted to, or engaged the ser-

vices of, individuals, and organizations that deny or have denied equal employment opportunity to minority group perpersons and women.

"(c) The continuing effects of past and present discrimination against minority group perpersons and women by the construction industry may be prevented, mitigated and/or eliminated by an affirmative action plan."

Ordinance §2-322.

The Affirmative Action Plan, adopted in accordance with section 2-325 of the Ordinance, is included as a contractual provision in all major City construction contracts. Since the City of Hartford enters into contracts for public works and improvements with contractors and not labor organizations or vendors, the Affirmative Action Plan is designed to encourage minority hiring on City contracts by placing primary responsibility on the contractors. All City contractors submitting bids on City contractors are required to provide an affidavit executed "by all subcontractors and officials of all organizations with which they have referral arrangements or agreements covering workers to be employed on the project involved, which affidavits shall incorporate such subcontractors and organizations into the affirmative action plan." Ordinance §2-327.

The Plan requires signatory contractors to make a "good faith effort" to achieve a level of minority group employment on City jobs of at least 15 percent on a trade-by-trade basis.[1] Plan §5(a). The Plan also calls

[1] In terms of implementation and enforcement, should the City Manager or his designee determine that a contractor is failing to meet the affirmative action goals, the City Manager is permitted to cancel the contract in question or withhold payment under the contract. The contractor may then appeal from the City Manager's actions to the City's Contract Enforcement Committee where an opportunity for a hearing is provided. Ordinance §2-330.

upon the craft unions to make good faith efforts to increase minority membership in the unions to 15 percent and to assist in achieving the 15 percent minority employment goal. Plan §5(a), (d). "Good faith effort" is defined in the Ordinance (§2-323) as "every reasonable attempt to comply with the provisions of this article and the Hartford Affirmative Action Plan and every possible measure to achieve the level and participation of minority group and female workers and trainees established by the plan...." The Plan establishes a five-year time limit within which to achieve these percentage goals. Plan §5(A).

B. Local 35's Noncompliance with the Hartford Affirmative Action Plan.

On October 31, 1975, plaintiff Local 35 was certified under the City's affirmative action program to participate on City construction contracts.[2] The Union submitted to the City an affidavit dated October 8, 1975, stating that it would not discriminate in regard to minority group workers and that it would make a good faith effort to comply with all provisions of the Hartford Affirmative Action Plan. Pursuant to its certification, Local 35 referred workers to City-contracted construction jobs.

Under a collective bargaining agreement between Local 35 and the Central Connecticut Chapter, Hartford

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[2] There are two methods by which a labor organization can become eligible to participate on City construction projects. The labor organization may either sign the Hartford Affirmative Action Plan, Ordinance §2-327, or be certified in accordance with section 2-328 of said Ordinance. The plaintiff Union has been certified in accordance with the latter procedure. (The certification provisions of section 2-328 are only available to organizations which perform "substantial construction work beyond the Greater Hartford Area....") The certification provisions of section 2-328 require the submission of certain data and pledges sufficient to enable the City Manager, or his designee, to make a determination as to whether the labor organization is an equal opportunity organization.

Division, National Electrical Contractors Association, Inc., Local 35 is the sole and exclusive source of referral of electrical workers for employment with firms which have assented to be bound by the collective bargaining agreement. The Union's referral procedure is open to both members and nonmembers of the Union. The referral procedure functions in the following manner: the Union maintains an "Out of Work List," which lists out-of-work applicants in the chronological order of the dates they register their availability for employment. (Said list is also known as the "rotation list.") The Union refers applicants for employment in the order in which the applicants appear on the Out of Work List.

The events directly leading up to this lawsuit began in January 1977, when the City of Hartford received correspondence from two different electrical contracting companies stating that the companies were unable to meet the 15 percent affirmative action hiring goal for electrical workers of minority descent. An investigation conducted by a representative of the City's Commission on Human Rights determined that the problem arose because Local 35 was referring electricians strictly on the basis of its rotation list. It was found at the time of the Commission investigation that the referral list being used by Local 35 had the names of 321 persons, 17 of whom were minority group members, and that the first minority worker listed held position number 85.[3] The

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[3] The following statistics indicate the status of minority and non-minority workers in the Union on February 8, 1977:

IBEW No. 35 total membership	- 550
Working	- 229
Not Working	- 321
Total Minority	- 41
Working	- 24
Not Working	- 17

On the rotation list, which contained 321 names, minority workers occupied the following positions: 85, 94, 121, 145, 157, 166, 167, 184, 188, 204, 212, 224, 236, 238, 287, 299, 308.

Commission representative concluded that strict adherence to the referral list would prevent referral of a sufficient number of minority electrical workers to city jobs and that Local 35's action directly conflicted with the minority manning provisions of the Hartford affirmative action program.

The City Manager, based on the Commission report, determined that Local 35 was not in compliance with the affidavit it had submitted to secure certification and the matter was referred to the City's Contract Enforcement Committee. Hearings were held before that body on April 21 and May 28, 1977. On July 7, 1977, the Contract Enforcement Committee issued its decision. The Committee held that strict use of the current referral list with its present makeup "will make compliance with the union's 'Affidavit for Certification' impossible," and that Local 35's "use of the 'out of work' list is clear evidence of lack of good faith effort to comply on the union's part." *In re Local Union 35*, City of Hartford Contract Enforcement Committee, at 4 (July 7, 1977). The Committee concluded that Local 35's noncompliance with its Affidavit of Certification could not be excused.

The Union was put on notice that its continued failure to comply with the commitments in its affidavit and to show a good faith effort to comply would lead to a decertification of the Union. If decertified, the Union can be barred from further participation on construction projects awarded by the City. Ordinance §2-328. Final action pursuant to the Committee's ruling was held in abeyance pending a ruling by this court in the instant action.

C. The Union's Legal Claims

The Union explicitly does not challenge the legality of the Hartford Affirmative Action Plan itself; the challenge is limited only to the manner in which the Plan is being implemented against the Union. *See* Hearing on

Motion for Preliminary Injunction, August 3, 1977, at 6-8; Plaintiff's Reply Brief to Defendants' Supplemental Memorandum at 4-5.[4] The Union asserts that the implementation of the Plan is unlawful on two grounds. First, the Union argues that the Plan as implemented violates the statutory and constitutional rights of the nonminority individuals who are a part of the Union's referral system. Specifically, the Union contends that the Plan's discriminatory impact on the nonminority members of the Union's referral system violates the rights granted those individuals by the Equal Protection Clause of the fourteenth amendment to the United States Constitution, article 1 of the Connecticut Constitution, 42 U.S.C. §1981, and 42 U.S.C. §1983.[5]

Secondly, the Union argues that the Plan as implemented conflicts with constitutional, statutory, and contractual obligations to which the Union claims it must adhere in administering its referral system. The Union claims that in order to comply with the requirements of the Plan, as enforced by the City's Contract Enforcement Committee, the Union would have to jump minorities ahead of nonminorities with respect to referrals from its rotation list and that to do so would violate state and federal laws prohibiting racial discrimation to

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[4] For example, counsel for the plaintiff summed up the present posture of the case by stating, *inter alia*, that: "no general attack is being made upon the City's Affirmative Action Plan, and the only challenge being made is as to a specific implementation of that plan." Plaintiff's Reply Brief to Defendants' Supplemental Memorandum at 4.

[5] The plaintiff Union claims that the City, through the operation of its Plan, directly and indirectly discriminates against nonminority group persons. First, the Union argues that the City Contract Enforcement Committee's decision to decertify the Union unless it gives preferences to minority members on the rotation list directly discriminates against nonminority members on that list. Secondly, the Union argues that the City indirectly discriminates against nonminority members by exerting pressure on contractors to meet the Plan's 15 percent minority hiring goal, which in turn causes those contractors to seek referrals only of minority persons.

which the Union is subject.[6] Though not denominated as such, this in effect is a claim that the Plan's enforcement violates due process in that it requires conduct inconsistent with other laws. In addition, the Union claims that the Plan unlawfully interferes with the Union's contractual rights in its collective bargaining agreement.

At a hearing before the court on August 3, 1977, all parties were of the opinion that no material issues of fact remained in dispute. Decision on the parties' cross-motions for summary judgment was postponed awaiting the United States Supreme Court's decision in *Regents of the University of California v. Bakke,* 46 U.S.L.W. 4896 (U.S. June 28, 1978). Both sides having briefed the effect of that opinion on the present case, the cross-motions for summary judgment are now ripe for decision, in accordance with Rule 56(c) of the Federal Rules of Decision [sic].[7]

Having reviewed the record before this court, I find no genuine issues of fact in dispute; the controversy can be decided on the law. Since the Union does not here challenge the City's right to adopt the Plan,[8] the legal

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[6] In its Complaint, the Union claims that the following statutes prohibit it from giving job referral preference to minority group persons: 42 U.S.C. §2000e-2(c)(2) ("It shall be an unlawful employment practice for a labor organization... [to] refuse to refer for employment any individual...because of such individual's race, color, religion, sex, or national origin."); 29 U.S.C. §158(b) (duty of fair representation); Conn. Gen. Stat. §31-126(c) (state unfair labor practice for a labor organization to discriminate against any of its members on the basis of race).

[7] Also pending is a separate Motion to Dismiss previously filed by the defendants; however, a decision on that motion will be unnecessary in light of the present decision.

[8] After disclaiming any challenge to the right of the City to adopt the Affirmative Action Plan, *see* Plaintiff's Reply Brief to Defendants' Supplemental Memorandum at 4-5, plaintiff, in a brief filed subsequent to the *Bakke* decision, did raise a challenge to the authority of the City to adopt its Plan. *See* Plaintiff's Supplemental

question presented to this court is a narrow one: whether, consistent with federal and state law, the Plan can be enforced so as to require the Union to give a preference to minority persons over nonminority persons when referring applicants for employment from the Out of Work List.

II. Discussion

In *Bakke, supra,* the United States Supreme Court gave its approval to affirmative action programs giving preferences to minority group victims of past discrimination

> "where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. *E.G., Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159 (CA3), cert. denied, 404 U.S. 954 (1971); *Associated General Contractors of Massachusetts, Inc. v. Altschuler,* 490 F.2d 9 (Cal 1973), cert. denied, 416 U.S. 957 (1974)."

Bakke, supra, 46 U.S.L.W. at 4905 (opinion of Powell, J.) (footnote omitted). As the Court stated, "After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others" is sufficient to justify an affirmative action

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8 (continued)

Brief Re Bakke at 8-11. In short, the Union now argues that since the operation of the Plan conflicts with Connecticut constitutional and statutory prohibitions of racial discrimination in employment, the City lacked authority to adopt the Plan. *See id.* at 11. Since I have found, infra, that the Plan as implemented does not violate state or federal law, the Union's argument here must be rejected.

plan vindicating the rights of the victims. *Id.* at 4906. The City of Hartford's Affirmative Action Plan was adopted after the City's legislative body, the Court of Common Council, made explicit findings, based on legislative review and public hearings, that many contractors, labor unions and hiring halls in the building industry in Greater Hartford "have discriminated, and continue to discriminate, against minority group persons and women." Ordinance §2-322, quoted in full *supra*.[9]

As a threshold matter, plaintiff Local 35 argues that since the City's legislative findings concerned discrimination by contractors and unions in the construction industry *in general*, rather than specific findings as to discrimination in the electrical trade in particular, the City is not justified in applying its Plan to the plaintiff electricians' union. That argument must fall in light of the fact that Justice Powell in *Bakke*, in the passage quoted *supra*, cited with approval *Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra*, and *Associated General Contractors of Massachusetts, Inc. v. Altschuler, supra*. Both of those cases upheld across-the-board affirmative action programs setting racial quotas for the building trades in specific geographical areas, where the programs were premised upon generalized findings of past discrimination rather than upon specific findings as to each and every union and contractor affected by the program.[10] Thus *Bakke*

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[9] The plaintiff does not challenge this finding. *See* Plaintiff's Reply Brief to Defendants' Supplemental Memorandum at 4-5.

[10] In *Contractors Ass'n*, the Department of Labor had promulgated the "Philadelphia Plan" in order to implement Executive Order 11246. This Executive Order bars discrimination in federal contracts and requires affirmative action with respect to the hiring and retention of minority workers. Finding that minority craftsmen were underrepresented in the building trades in Philadelphia, 442 F.2d at 163, 173, the Department required that bidders in the Philadelphia region submit affirmative action plans with specific goals for utilizing minority workers. The Third Circuit upheld the program, finding no violation of equal protection or Title VII.

makes clear that a legislative finding of industry-wide discrimination in the construction crafts and trades in the Greater Hartford area gives rise to a governmental interest in vindicating the rights of the injured group which is sufficiently compelling to justify the adoption of an affirmative action program affecting all building contractors and unions working on City contracts in the area.[11]

Given that the Affirmative Action Plan can validly be applied to the plaintiff electrician's union, this court must decide the legal boundaries within which the requirement that the Union use good faith efforts to comply with the 15 percent minority hiring goal on City projects can be enforced against the Union. The Union claims that any enforcement of the Plan which requires that a preference be given to minority workers on its referral list, solely on the basis of race, violates statutory and constitutional prohibitions of racial discrimination against nonminorities. This court is therefore called upon to resolve the legal "tension between the needs of effective enforcement [of an affirmative action plan] and the avoidance of reverse discrimination." *EEOC v. Local 638...Local 28, Sheet Metal Workers*, 532 F.2d 821, 827 (2d Cir. 1976).

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10 (continued)

In *Altschuler*, the First Circuit upheld an affirmative action plan promulgated by the Commonwealth of Massachusetts for state supported construction programs. The Massachusetts plan went beyond a federal plan adopted under Executive Order 11246 and required, in effect, a 20 percent minority hiring goal. Again, the program was premised on a general administrative finding of underrepresentation of minority workers in the trades. 490 F.2d at 13-14.

11 The interest of the City is particularly strong here since the construction projects affected by the Affirmative Action Plan are financed by City dollars. *Cf. Fullilove v. Kreps*, No. 78-6011, slip op. at 4824 (2d Cir. Sept. 22, 1978) (federal affirmative action program involving allocation of federal funds). *See generally, Altschuler, supra; Contractors Association of Eastern Pennsylvania, supra.*

A. Constitutional Limits on Reverse Discrimination.

First, it is clear that the enforcement of the Plan is not invalid simply because it requires the Union to give preferences to minority workers on the Out of Work List solely on the basis of race. The Second Circuit Court of Appeals in the clearest language recently reaffirmed that

> "[i]n employment discrimination cases it is well established that the government's interest in overcoming the disadvantages resulting from past discrimination in employment on account of race is sufficiently compelling to justify a remedy which requires the use of racial preferences."[12]

Fullilove v. Kreps, No. 78-6011, slip op. at 4832 (2d Cir. Sept. 22, 1978) (footnote omitted). In *Fullilove*, the Second Circuit upheld a federal statute requiring that 10 percent of all federal funds appropriated for specified public works projects be expended for minority business enterprises. The legislatively mandated preference for minority businesses was premised on legislative findings of past discrimination in the construction industry nationwide.

The court in *Fullilove* noted, however, that "[i]n affirmative action programs to remedy the effects of past discrimination the effect of preferring members of

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[12] The court went on to state:

> "The vitality of the rationale in those cases has not [been] disturbed by the recent decision of the Court in *Regents of the University of California v. Bakke, supra*. The Justices did not disagree with the principle that race-conscious remedies can be imposed when there have been judicial, legislative or administrative findings of past discrimination and the remedies fashioned are appropriately drawn to rectify that discrimination. *Id.*, 46 U.S.L.W. at 4905 & n. 41 (opinion of Powell,J.)."

Fullilove, supra at 4832-33.

the injured groups at the expense of others must be considered." *Id.* at 4833. The court continued:

> "It is established that in fashioning remedies for past discrimination courts must be sensitive to interests which may be adversely affected by the remedy. The courts, here, as in a number of other areas where legislation for which there is a compelling interest collides with constitutional principles, have adopted an ad hoc balancing test which examines each particular case.... One of the significant limitations on a remedy of 'reverse discrimination' for past discrimination is that its effects shall 'not be "identifiable," that is to say, concentrated upon a small ascertainable group of nonminority persons.' *EEOC v. Local 638...Local 28, Sheet Metal Workers,* 532 F.2d 821, 828 (2d Cir. 1976). *See also Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420, 427 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976)."

Fullilove, supra at 4833-34.

The above-quoted test - that the effects of an affirmative action plan must not be concentrated upon a small ascertainable group of nonminority persons - is a judicially-fashioned limitation on affirmative action remedies in the Second Circuit. This test originated as a limitation on court-imposed remedies under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*,[13] and was applied by *Fullilove* as a limitation on legislative affirmative action plans adopted after findings by the legislature of past discrimination. Since the instant case is analogous to *Fullilove* in that the

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[13] *See, EEOC v. Local 638...Local 28, supra,* 532 F.2d at 828; *Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420, 427 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976).

Hartford Plan was imposed by the City's legislative body on the basis of legislative findings of discrimination in the construction industry, the validity of the remedy enforced upon the Union under the Plan should be judged in light of this "non-identifiability" limitation.[14]

The Union argues that by requiring the giving of a preference to minority workers on the Out of Work List, the City's Plan discriminates against an identifiable group of nonminority persons - *i.e.*, those nonminority persons higher up on the Out of Work List who are skipped over in favor of the minority persons - and therefore directly violates the "non-identifiability" limitation on affirmative action remedies. Though the Union's argument has a surface appeal, a deeper analysis of the Second Circuit case law reveals that the challenged enforcement of the Plan does not exceed permissible limits established in this jurisdiction.

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[14] In reality, the "non-identifiability" limitation is the second prong of a two-pronged test for the validity of affirmative action racial quotas in the Second Circuit. Fully stated, the two-pronged test is as follows:

> "There must first be a 'clear-cut pattern of long-continued and egregious racial discrimination.' Second, the effect of reverse discrimination must not be 'identifiable,' that is to say, concentrated upon a relatively small, ascertainable group of non-minority persons."

EEOC v. Local 638...Local 28, supra, 532 F.2d at 828, *quoting Kirkland, supra*, 520 F.2d at 427. The first prong establishes the justification necessary for an affirmative action plan; the second prong establishes limits on the permissible impact of the plan. The plaintiff Union does not challenge the City's Plan on the ground the Plan was not legally justified. The City's unchallenged legislative findings of past discrimination provide the requisite justification for the Plan. *See Bakke, supra; Fullilove, supra.* The Union argues, however, that the Plan's impact on the Union and its workers exceeds the permissible boundaries set out by the second prong, the "non-identifiability" limitation, of the above test.

1. The Non-Identifiability Limitation

The non-identifiability limitation on affirmative action programs originated in *Kirkland v. New York State Department of Correctional Services, supra.* At issue in *Kirkland* was the legality of a court-imposed quota requiring that at least one out of every four promotions to the position of correction sergeant in the New York State Department of Correctional Services be Black or Hispanic. Prior to *Kirkland*, the Second Circuit Court of Appeals had upheld the imposition of *hiring* quotas to remedy the effects of past discrimination. *See Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); *cf. Rios v. Enterprise Association Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974) (upholding a minority membership goal imposed upon a union).

Kirkland, however, distinguished a hiring quota from a promotion quota and held that the promotion quota involved there constituted constitutionally impermissible reverse discrimination. 520 F.2d at 429. The court reasoned as follows, at 429:

> "A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be by-passed for advancement solely because they are white."

The *Kirkland* court then proceeded to quote the following passage from *Bridgeport Guardians, supra:*

> "'...the imposition of [promotion] quotas will obviously discriminate against those Whites

> who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes.'"

520 F.2d at 429, *quoting Bridgeport Guardians, supra,* 482 F.2d at 1341.

In *EEOC v. Local 638...Local 28, supra,* the Second Circuit formulated the reasoning of *Kirkland* into a full-fledged test for the imposition of temporary racial quotas:

> "[T]he imposition of racial goals is to be tolerated only when...the effects of 'reverse discrimination' will be diffused among an unidentifiable group of unknown, potential applicants rather than upon an ascertainable group of easily identifiable persons."

532 F.2d at 828. At issue in *EEOC* was the lawfulness of various remedies ordered by the district court to remedy racially discriminatory membership policies of the defendant union and its apprenticeship training program. Applying the "non-identifiability" test, the Court of Appeals struck down the district court's order requiring that one of the three members of the Joint Apprenticeship Committee (JAC) overseeing the union apprenticeship program be replaced by a representative of minority descent. The court reasoned that in order to place a minority member on the JAC, one of the three white incumbents would have to be bumped; thus the effects of imposing this racial goal would "fall upon a relatively small, identifiable group of reverse discriminatees" - a result which, the court held, "cannot be justified under the 'non-identifiability' test adopted by this court in *Kirkland.*" 532 F.2d at 830.

The Court of Appeals in *EEOC* did, however, uphold that part of the lower court's order requiring the defendant union and the JAC to attain a 29 percent minority group membership in the union and apprenticeship program by 1981. The court reasoned as follows:

> "While we disapprove of a membership goal for the JAC, we affirm the use of such a goal with respect to overall membership in Local 28 and the apprenticeship program. As this court noted in *Kirkland* and *Bridgeport Guardians, Inc., supra*, an entry-level quota has a more diffuse and amorphous effect upon reverse discriminatees than a quota used to bump incumbents or hinder promotion of present members of the work force. An entry-level goal has less ascertainable effect since we cannot readily determine who it is that is being kept out. Accordingly, entry-level goals have less identifiable impact upon reverse discriminatees and are therefore less objectionable as temporary remedies."

532 F.2d at 830.

Thus the posture of the law in the Second Circuit is that the effects of past discrimination can be removed by imposing racial preferences at the entry or hiring level but not at the promotion level, based on the rationale that the effects of the former are more diffuse and amorphous, and therefore less objectionable, than the effects of the latter.[15] Given the above posture of the law, this court must focus on the impact of the racial goal imposed upon Local 35's referrals from its Out of Work List.

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[15] In *Fullilove v. Kreps, supra*, the court found that the impact of the 10 percent quota for minority businesses under the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), was so "thinly spread among nonminority businesses comprising 96 percent of the construction industry" that the quota did not violate the "non-identifiability" test of *EEOC* and *Kirkland*. *Fullilove, supra* at 4834-35.

To recap the pertinent facts, the City's Affirmative Action Plan requires contractors and unions to make good faith efforts to achieve 15 percent minority employment on City construction contracts. The plaintiff, an electricians' union, maintains a hiring hall with several contractors on City projects. The Union keeps an Out of Work List, listing all unemployed electrical workers in the order of the date they register their availability for employment, from which employment referrals are made to contractors. At the time in controversy here, the list was composed of 321 workers, 17 of whom were minority group members. The first minority member on the list was number 85. When the Union refused to skip over nonminority workers on its Out of Work List in order to refer minority workers more quickly to the contractors, the Union was judged by the City not to be in compliance with the Plan's "good faith efforts" obligation and thus subject to disqualification from City contracts. In effect, the City's Plan imposes a racial goal on the Union's referrals from its Out of Work List. The Union contends that since the "victims" of this affirmative action remedy - the nonminority workers passed over on the list - are a small, readily identifiable group, this remedy violates the Second Circuit's non-identifiability test.

2. Applying the Non-Identifiability Limitation.

A step-by-step analysis reveals that if the Union's argument were accepted, the case law in this circuit upholding racial hiring quotas would be completely undermined. First, it is established law that the City's Plan can validly require the Hartford area contractors (who are not parties to this action) to give hiring preferences to minority applicants. *See* discussion *supra*.[16] In the

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[16] Legislative findings of past discrimination can justify the imposition of a racial preference, *see Bakke, supra; Fullilove, supra;* and an affirmative racial hiring goal imposed upon contractors does not violate the rights of nonminority applicants for employment, *see EEOC v. Local 638...Local 28, supra,* 532 F.2d at 830; *Kirkland, supra,* 520 F.2d at 429; *Bridgeport Guardians, supra,* 482 F.2d at 1340.

absence of a union referral system here, the contractors would hire directly from the electrical workers in the public at large. The Union, however, has interposed itself between the contractor and the public pool and acts as a screening agent. That is, the Union is a "middleman" between the hiring contractors and the available work force.

The underlying relationship has never changed, however. The contractor is still hiring from the general public, though now the hiring process is channeled through two stages: first the job applicants go to the Union; next, the Union refers those who come to it to the employers who are seeking to employ qualified workers. The City's Affirmative Action Plan, by requiring that preferences be given to minority persons on the Out of Work List, imposes a racial requirement at the referral stage of the hiring process. Since it is established law that a racial goal imposed at the hiring level does not impermissibly discriminate against nonminority applicants for employment, such a requirement should be able to be imposed at any stage of the hiring process. Otherwise, the policy underlying a hiring-level goal could be thwarted simply by contractors agreeing to hire employees through a union.

Whatever procedure the Union uses to select and refer members of the public for employment must still be subject to the same affirmative action obligations that a contractor hiring directly from the public would be required to meet. The rights allegedly infringed are those of the nonminority applicants for employment. If those rights are not violated when a contractor, pursuant to an affirmative action plan, gives a direct hiring preference to minority applicants, then those rights are not violated when the Union is required, on behalf of the contractor, to give the preference to minority applicants. When all the sound and fury subsides, it is evident that the affirmative action imposed upon the Union's referral procedure is a valid and constitutional requirement.

Furthermore, a close look at the Second Circuit case law reveals that the Union's interpretation of the non-identifiability test would render that test meaningless. In explaining the rationale for permitting hiring level racial quotas, the court in *Kirkland, supra*, stated: "A hiring quota deals with the public at large, none of whose members can be identified individually *in advance.*" 520 F.2d at 429 (emphasis added). As is implicit in this statement, there is no question that the individual members of the public adversely affected by a hiring level quota can be identified *at a later point in time* - simply by later obtaining all applications and determining the pool of applicants for whom jobs were not available. But since the Second Circuit Court of Appeals has upheld hiring quotas on several occasions, *see* discussion *supra*, the fact that the pool of applicants who are denied jobs can later be identified does not render the racial preference invalid. As the Second Circuit stated in *EEOC, supra*, "[a]n entry-level goal has less ascertainable effect [than a promotion level goal] since we cannot *readily* determine who it is that is being kept out." 532 F.2d at 830 (emphasis added).

The consequence of Local 35's use of the Out of Work List is to make identifiable, in advance, the members of the prospective work force who will be disadvantaged by the giving of preference to minority applicants for employment. The Union's referral procedure gathers together in advance the names of the indiviuals who will be passed over because of the Affirmative Action Plan. The Second Circuit Court surely did not intend to allow its approval of hiring quotas to be frustrated by the ability of private parties to establish a procedure which narrows down the potential number of job applicants to a small, readily identifiable group.

If the Union's interpretation of the non-identifiability test were to prevail, then no hiring level quota could ever withstand that test so long as a private party were able to devise a way in which to identify beforehand the

ultimate "victims" of the quota. For the non-identifiability test not to be interpreted so as to thwart the very remedies approved by the court which devised the test, it must be interpreted to mean that the *potential* victims should not be individually identifiable, not that the *actual* victims cannot at some point be identified. For example, the potential victims of a racial hiring quota are all those nonminority members of the public who *may* apply for the affected job; the actual victims are those who *do* apply and are denied a job because of their nonminority status. On the other hand, in a promotion situation, the potential victims, as well as the actual victims, are a more limited group of specific employees who have qualified as eligible for promotion; thus "who it is that is being kept out" by a racial goal at the promotion level is "readily" determinable. *See EEOC, supra,* 532 F.2d at 830; *Kirkland, supra.*

In the instant case, the potential victims of the remedial obligation imposed upon the Union are all those nonminority electrical workers in the general public who may at some point apply for a job on a City construction project; this is not a readily identifiable group of people. The actual victims are identifiable - those nonminority workers on the referral list at the time a preference is given to a minority worker - but this, as discussed *supra,* does not violate the Second Circuit's non-identifiability test. Thus the fact that the Union has narrowed down the pool of electrical workers in the general public to a list of 321 applicants on the Out of Work List does not render an otherwise enforceable remedy unenforceable. To accept the Union's argument would allow the Union, through the operation of its hiring hall, to nullify the City's otherwise lawful attempt to rectify the vestiges of past discrimination in the construction industry, which is the purpose of a valid racial hiring goal.[17]

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[17] This is not meant to imply that the Union deliberately seeks to thwart the City's Plan; however, intentional or unintentional, that would be the result of accepting the Union's legal position.

Moreover, the underlying judicial concern in this area of the law is that the impact on innocent persons of an affirmative action plan not be "inequitable." *See Fullilove, supra* at 4833-35. In assessing what is a permissible impact, the court must balance the need for the remedial program against the interests of the individuals adversely affected by the program. *Id.* at 4833; *see Hollander v. Sears, Roebuck & Co.*, 450 F. Supp. 496, 505-06 (D. Conn. 1978). As Justice Powell stated in *Bakke, supra*, 46 U.S.L.W. at 4906, the concern of the courts is that the remedial action "work the least harm possible" to the innocent individuals who must bear the burden of a justified affirmative action program.

The impact of the plan at issue here is not unduly burdensome on the affected nonminority electrical workers. At the time when this controversy arose, there were 17 minority applicants on Local 35's Out of Work List, accounting for 5.3 percent of the 321 persons on the list. If preferences were given to the minority applicants, the nonminority applicants passed over in favor of the former would still remain on the Out of Work List and still be eligible for referral when their turn later arose. Thus these "reverse discriminatees" would not be permanently denied employment, *cf. Bakke, supra*, 46 U.S.L.W. at 4906 (affirmative action admissions program "totally foreclosed" certain applicants from admissions to the university); rather they would only experience a *delay* in their being referred for employment. Such an impact is neither overly severe nor lasting.

Furthermore, applicants on plaintiff's Out of Work List are not ranked according to seniority nor according to scores on a job-related test; the applicants are simply ranked in the order in which they register their availability for employment. These applicants know from the start that they will have to wait an indefinite period of time before they will be referred for employment; as a result of the Hartford Plan, that indefinite period of

time would be somewhat longer for the nonminority applicants. It is clear, therefore, that the reasonable expectations of the nonminority applicants would only be minimally affected by the Plan. That being the case, the burden which the Plan imposes upon them is not unduly onerous. *See Fullilove, supra*, at 4834-35 (where the "reasonable expectations" of the nonminority contractors were only "minimal[ly]" frustrated by the 10 percent set aside for minority contractors under the Public Works Employment Act of 1977, the set-aside was upheld as not imposing "inequitable results").

In *Fullilove* the court concluded, at 4835: "Considering that nonminority businesses have benefited in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competing for this relatively small amount of business" set aside for minority enterprises. Likewise here, considering that nonminority applicants for employment in the construction industry have benefited in the past by not having to compete against minority applicants, it is not inequitable to delay their being referred for employment in order to meet the 15 percent minority hiring goal of the Hartford Plan.

For all of the foregoing reasons, I hold that the Plan's requirement that a preference be given to minority applicants on the Out of Work List does not violate the rights of the nonminority individuals represented by the Union. Accordingly, summary judgment must be granted for the defendants as to the Union's claims under the Equal Protection Clause of the fourteenth amendment of the United States Constitution, 42 U.S.C. §1981, and 42 U.S.C. §1983.[18]

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[18] The Union's state constitutional claims must fall in tandem with their federal constitutional claims. Section 8 (due process of law) and section 20 (equal protection clause) of article I of the Connecticut Constitution have been held to have substantially the same meaning as the due process and equal protection clauses of the federal Constitution. *Snyder v. Town of Newton*, 147 Conn. 374, 381, 161 A.2d 770 (1960). There being no violation of the federal Constitution, I find no violation of the Connecticut Constitution.

B. Conflict with Other Union Obligations

Having decided that the challenged enforcement of the City's Plan does not violate the constitutional rights of nonminority persons on the Union's Out of Work List, I now proceed to plaintiff's other major legal claims: (1) that the Plan as enforced requires the Union to violate federal and state employment laws prohibiting discrimination on the basis of race, and (2) that the Plan as enforced constitutes an unlawful interference with the Union's contractual rights.

The Union contends that the City's Plan, by requiring the Union to give priority to minority workers on the referral list, forces the Union to violate statutory obligations it owes to the nonminority individuals on the referral list. The Union argues that it is forced to violate section 703(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(c)(2), which provides:

> "It shall be an unlawful employment practice for a labor organization - ...
>
> (2) to...fail or refuse to refer for employment any individual...because of such individual's race, color, religion, sex, or national origin."

A similar argument was made and rejected in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). In that case, contractors challenged a legislatively imposed affirmative action plan (the Philadelphia Plan) mandating a minority hiring quota on the ground, *inter alia*, that the quota forced them to violate section 703(a) of Title VII, 42 U.S.C. §2000e-2(a). Section 703(a) imposes on employers a parallel obligation to that imposed by section 703(c) on unions. Section 703(a) provides:

> "It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire...any individual...because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. §2000e-2(a). The Third Circuit held that the Philadelphia Plan's hiring quota did not violate the Title VII provision making it an unlawful employment practice to refuse to hire an individual on the basis of race:

> "To read §703(a) in the manner suggested by the plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history....
>
> ...
>
> ...It has been said respecting Title VII that 'Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act.' *Quarles v. Philip Morris, Inc., supra*, 279 F. Supp. at 514."

442 F.2d at 173.

For reasons identical to those stated by the Third Circuit, I hold that section 703(c) of Title VII is not violated when the Union gives a preference to minority workers on its referral list in order to comply with the City's Plan. To hold otherwise would "freeze the status quo" since virtually any remedial action designed by the legislature to reverse the effects of past discrimination would be prohibited by Title VII - a result clearly not intended by Congress in enacting that title of the Civil Rights Act of 1964. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 762-63 (1976). On the same basis, the parallel Connecticut state law prohibiting union dis-

crimination on the basis of race, Conn. Gen. Stat. §31-126(c), cannot be read so as to prevent the City of Hartford from attempting to remedy the effects of past discrimination in the Hartford-area construction industry, absent any showing that the Connecticut legislature intended to foreclose such otherwise valid remedial action.

The Union next claims that the implementation of the Plan unlawfully interferes with the Union's contractual rights with respect to the exclusive union referral system to which the union and various contractors have bound themselves in a collective bargaining agreement. In order to be certified to work on City construction projects, Local 35 voluntarily agreed to be subject to the Hartford Plan, including the requirement that the Union make good faith efforts to comply with the 15 percent minority hiring goal. The Union, therefore, had the choice of not referring its workers for jobs on City construction projects at all if it was unwilling to take the risk that full compliance with the City's Plan did not violate its contractual obligations. The fact that the manner in which the Union operates its hiring hall may conflict with the requirements of the Plan is not a legal ground for invalidating those requirements. *See Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra,* 442 F.2d at 174.

In *Contractors Association,* the interested unions, by way of amici brief, joined with the plaintiff contractors in arguing that the minority hiring quota imposed by the Philadelphia Plan unlawfully interfered with the exclusive hiring hall contracts entered into by the unions and the contractors. *Id.*, at 172. The court convincingly rejected that claim by stating:

> "It is clear that while hiring hall arrangements are permitted by federal law they are not required.... *If the [affirmative action] Plan violates neither the Constitution nor federal law, the fact that its contractual provisions may be*

at variance with other contractual undertakings of the contractor is legally irrelevant."

442 F.2d at 174 (emphasis added). If the Union's argument here were to prevail, the Union, through a private contract, would be allowed to obligate itself to violate a valid affirmative action plan. Since union rules and contracts are not superior to the law of the land, the Union's argument must be rejected.[19]

The Union also claims that compliance with the Hartford Plan would force it to violate its duty of fair representation of all employees regardless of race, which, the Union contends, would be an unfair labor practice prohibited by section 8(b) of the National Labor Relations Act, 29 U.S.C. §158(b). If a nonminority electrical worker were to bring an unfair labor practice suit against the Union claiming discriminatory treatment, or were to attempt to bring a breach of contract suit claiming that the Union violated its obligations under the referral procedure, the duties of the Union would be interpreted by the NLRB in accordance with governing federal law. *See Amalgamated Association of Street, Electrical Railway & Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 284-91. Since the City's legislatively imposed preference for minority workers on the Out of Work List is perfectly lawful, *see* discussion *supra*, the Union's compliance with that Plan would be justified under federal law. As with the Title VII limitation discussed *supra*, if the National Labor Relations Act were held to be violated by the Union's compliance with a lawful affirmative action plan, the NLRA would "freeze the status quo" and "foreclose remedial action designed to overcome existing evils." *Cf. Contractors Association of Eastern Pennsylvania, supra*, 442 F.2d at 173 (Title VII). There is no indication

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[19] Accordingly, plaintiff's pendent state law claim that the City's actions constitute tortious infringement of the Union's property right in its collective bargaining agreement must be rejected.

that the NLRA was intended to have that effect. Thus the Union's compliance with the City's Plan would not constitute an unfair labor practice.

For all of the foregoing reasons, the enforcement of the Hartford Affirmative Action Plan neither violates the rights of nonminority electrical workers represented by the Union nor requires the Union to violate the law. Accordingly, the Union's challenge to the Plan is defeated, and the defendants are entitled to judgment as a matter of law pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.

SO ORDERED.

Dated at Hartford, Connecticut, this 11th day of December, 1978.

/s/ M. Joseph Blumenfeld
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Filed March 7, 1978

LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS	:	
V.	:	CIVIL NO. H-77-167
CITY OF HARTFORD, ET AL	:	

RULING ON PENDING MOTIONS

Subsequent to this court's decision of December 11, 1978, granting summary judgment for the defendants in this action, the plaintiff Local Union No. 35 filed several motions challenging that decision.[1] The grounds upon which the plaintiff Union seeks to reopen the case are discussed below.

I

The plaintiff contends that the court "erroneously refused to consider Plaintiff's claim that the City had no legal authority to adopt its Affirmative Action Plan."

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[1] Plaintiff has filed a Motion For New Trial Pursuant to FRCP Rule 59 and FRAP 4(a), Motion to Amend and Make Additional Findings of Fact Pursuant to FRCP 52(b) and FRAP 4(a), Motion to Alter and Amend the Judgment Pursuant to FRCP 59 and FRAP 4(a), Motion for Permission to File Third Amendment to Complaint, Motion for Permission to Amend Proposed Third Amendment to Complaint, and Motion For Permission to File Proposed Fourth Amendment to Complaint.

Plaintiff's Motion For A New Trial Pursuant to FRCP Rule 59 at ¶2(1). As presented in its recent motions, plaintiff's claim of lack of authority on the part of the City to adopt its Affirmative Action Plan consists of two separate claims: (1) that the City lacked legal authority to adopt its Affirmative Action *Ordinance*, which was the basis for the adoption of the Affirmative Action Plan, and (2) that the City's legislative finding of discrimination set forth in the Ordinance was "not supported by any proper or sufficient legislative record or facts." *See* Plaintiff's proposed Amended Third Amendment to Complaint ¶52.

As to the first claim, plaintiff had an opportunity to assert such a claim at any time during the course of this action. To the extent that plaintiff did raise such a claim at a late stage in the proceedings - in Plaintiff's Supplemental Brief Re Bakke, at 8-11 - I considered the argument which was set forth therein, and rejected it. *See* Ruling on Pending Motions (hereinafter Ruling), December 11, 1978, at 10 n. 8.

Regarding plaintiff's contention that the court refused to consider plaintiff's challenge to the City's legislative finding of discrimination, this contention is erroneous. The record of this case prior to my decision of December 11, 1978 clearly reflects the plaintiff's legal position with regard to the City's finding of discrimination: the plaintiff maintained that it had "no interest" in challenging the City's generalized finding of industry-wide discrimination since, plaintiff argued, such a finding alone could not justify the City's Affirmative Action Plan as implemented. *See* Plaintiff's Reply Brief to Defendants' Supplemental Memorandum at 4; Plaintiff's Supplemental Brief Re Bakke at 8. Plaintiff consistently argued that since the City did not make a specific finding of discrimination by this particular union, as opposed to the generalized finding of industry-wide discrimination, the City could not adopt an affirmative action plan which could be imposed upon this union. In my decision of December 11, 1978, however, it was made

clear that legislative findings of industry-wide discrimination do provide a sufficient basis for an affirmative action plan which can be imposed upon a union in that industry. *See* Ruling at 11-13.

Having relied on a legal theory which considered the City's legislative findings "irrelevant," *see* Plaintiff's Reply Brief to Defendants' Supplemental Memorandum at 8, plaintiff chose not to attack those findings.[2] Now, after the decision of this court, plaintiff recognizes the significance of the City's legislative findings and seeks to challenge the factual basis of those findings. Motions made under Rules 52(b) and 59 of the Federal Rules of Civil Procedure are ordinarily not granted where they are used by the losing party to present the case under new arguments which could have been raised in the original proceedings. *See, e.g., Grumman Aircraft Eng'r Corp. v. Renegotiation Board,* 482 F.2d 710, 721 (D.C. Cir. 1973), *rev'd on other grounds,* 421 U.S. 168 (1975); *Echevarria v. United States Steel Corp.,* 392 F.2d 885, 892 (7th Cir. 1968); *Evans, Inc. v. Tiffany & Co.,* 416 F. Supp. 224, 245 (N.D. Ill. 1976).[3]

Moreover, nothing the Union has presented in support of its motions leads this court to find that the interests of justice would be served by allowing the

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[2] At one point in the proceedings, plaintiff did raise a challenge to the City's legislative findings, but this challenge was only directed to the fact that the City's findings were not focused on the electrical trade in particular, not that the general industry-wide findings themselves were contrary to evidence. *See* Plaintiff's Supplemental Brief Re Bakke at 8; Plaintiff's Reply Brief to Defendants' Supplemental Memorandum at 8-11.

[3] Plaintiff also argues that the defendants must be held to have waived reliance on the City's legislative findings as justification for the Affirmative Action Plan because the defendants failed to plead "justification" as an affirmative defense in their answer. This argument must be rejected. Rule 8(c) of the Federal Rules of Civil Procedure does not list "justification" among the specific defenses which are to be pled affirmatively.

Union now to attack the factual basis of the City's legislative findings. The grounds upon which the plaintiff presently challenges the City's findings, *see* Plaintiff's Combined Memorandum, filed January 3, 1979, at 19-21, would not justify this court's invalidating those findings under whatever standard of judicial review is applicable, whether that of "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' [or] the possibly stricter standard of... 'unsupported by substantial evidence.'"[4] *Cf. Automobile Club of New York, Inc. v. Cox*, No. 78-6054, slip op. at 915 (2d Cir. Jan. 12, 1979). Great deference must be accorded the deliberative actions of a legislative body. *See Fullilove v. Kreps*, 584 F.2d 600, 604-06 (2d Cir. 1978). Thus plaintiff's effort to reopen the case to raise this challenge is rejected.

II

Plaintiff raises several other grounds in support of its motions. The majority of these grounds state arguments previously raised by the plaintiff which were considered and rejected in my decision of December 11, 1978. Plaintiff's motions under Fed. R. Civ. P. 52(b) and 59 are denied to the extent that they attempt to relitigate matters previously decided. As to grounds not raised previously - namely, (1) plaintiff's claim that the standard for determining the existence of and membership in an ethnic group to be accorded preferential treatment is unconstitutionally vague and (2) plaintiff's claims raised in its Proposed Fourth Amendment to the Complaint - these are rejected as not timely presented. *See* cases cited *supra*.

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[4] The background and history underlying the City's legislative findings are set forth in the Affidavit of Nicholas Carbone, Deputy Mayor of the City of Hartford and a member of the Hartford Court of Common Council, the City's legislative body. *See* Affidavit of Nicholas Carbone, filed March 2, 1978.

III

Plaintiff also moves to reopen the case on the ground that the court made several erroneous "findings" in the decision of December 11, 1978. See Plaintiff's Motion to Amend and Make Additional Findings of Fact Pursuant to FRCP 52(b). All of the erroneous statements which plaintiff alleges were made in the court's decision have been dealt with by the above discussion with the exception of the following: plaintiff requests that the court's statement that the potential victims of the Affirmative Action Plan are "all those nonminority electrical workers in the general public who may at some point apply for a job on a City construction project," Ruling at 26, be deleted and changed to "all those unemployed nonminority electrical workers who are journeymen electricians licensed in Connecticut" who may at some point apply for a job on a City construction project. Plaintiff's Motion to Amend and Make Additional Findings of Fact at ¶12. Since the group of nonminority licensed journeymen electricians is derived from all those nonminority electrical workers in the general public, the court's statement was not inaccurate; nor would the plaintiff's requested change affect the court's analysis or ultimate decision in any way. Thus no amendment to the court's decision in this regard is necessary.

For all of the foregoing reasons, plaintiff's motions to reopen the case[5] are denied, and it is

SO ORDERED.

Dated at Hartford, Connecticut, this 7th day of March, 1979.

/s/ M. Joseph Blumenfeld
United States District Judge

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[5] *See* note 1 *supra.*

BEFORE THE CONTRACT ENFORCEMENT COMMITTEE

CITY OF HARTFORD July 7, 1977

IN THE MATTER OF: LOCAL UNION NO. 35 (I.B.E.W.)

MEMORANDUM OF DECISION

The Greater Hartford Affirmative Action Plan adopted on November 25, 1974, was established to "ensure equal employment opportunity for minority group persons, including women...in all phases of construction work performed pursuant to major contracts awarded by the City of Hartford...under the provisions of its Municipal Charter and Code." (Section 1. purpose, Greater Hartford Affirmative Action Plan).

The present controversy involves certification, the procedure whereby the Hartford City Manager or his or her designee, certifies an organization to participate in city construction work.

On October 8, 1975, Local No. 35 of the International Brotherhood of Electrical Workers (IBEW), hereinafter "Union Local No. 35" or Union," submitted its Affidavit for Certification, in which it stated in paragraph 4:

> "The local hereby agrees to comply with the contractual responsibilities regarding the manning of City of Hartford projects."

The manning responsibilities with respect to City of Hartford projects are detailed in Section 5D of the "Greater Hartford Plan," which reads in essential part as follows:

"The category C party (Human Relations Commission)...shall set minimum participatory goals on city projects for minority personnel, including women. Such goals shall be at least fifteen (15%) percent of the daily manhours worked by each trade on such project..."

Pursuant to its Affidavit for Certification, the union was provisionally certified on October 31, 1975 under Section 8 of the Municipal Code and Greater Hartford Plan as eligible to participate on city construction and improvement projects.

Union Local No. 35 is a labor organization which represents electrical workers throughout Connecticut and in areas of Rhode Island. The union is party to a collective bargaining agreement with the Central Connecticut Chapter, Hartford Division National Electrical Contractors Association, Inc. (hereinafter NECA) under which the union is the exclusive source of referral of applicants for employment.

The union was able to comply with its manning responsibilities under the Plan until the early months of 1977, during which time several contractors working on city construction projects who utilize the local's members notified Mr. Johnson that they were unable to comply with the 15% minimum minority manning requirement because the union was not referring enough minority workers to the projects involved.

On February 8, 1977, Mr. Ronald Fletcher, Senior Field Representative for the City's Commission on Human Relations met with officials of the union and its attorney, Mr. William Zeman, to discuss the compliance problem.

During the meeting, the union disclosed that it was using an "out of work" list system for referral of its workers. The list had been in use since January of 1976, but the City of Hartford had not been notified of the list's existence and use.

At the time of the meeting, the "out of work" list in question contained 321 names and the minority worker appearing first on the list was number 85 out of the 321 names.

Mr. Fletcher, noting and concluding that reliance on such a referral system would not meet the 15% minimum minority manning goals, met with his superior Mr. Johnson to discuss possible courses of action.

Pursuant to that meeting, Mr. Johnson informed this Committee by memorandum dated February 28, 1977 that utilization of the "out of work" list of union local No. 35 would be "directly in conflict with the minority manning provisions for City of Hartford projects..." and recommended that the Contract Enforcement Committee of the Court of Common Council meet to consider the continued eligibility for IBEW Local No. 35 to participate upon City of Hartford projects pursuant to Section 2-175.8 (now 2-321-33) of the Code.

On April 11, 1977, Councilman Raymond Monteiro, Chairman of the Contract Enforcement Committee, acting upon Mr. Johnson's recommendation, called for a public hearing, which was held by the Contract Enforcement Committee on April 21, 1977.

Findings:

1. Pursuant to its signed "Affidavit for Certification," submitted to the City of Hartford on October 8, 1975, union local No. 35 was provisionally certified by the Hartford City Manager under Section 8 of the Hartford Affirmative Action ordinance on October 31, 1975. This Certification established the eligibility of the union to participate in City of Hartford construction and improvement projects.

2. The union complied with the Affirmative Action Plan's 15% minimum minority manning requirement from the time the union signed the "Affidavit for Certification" until the early months of 1977, at which time

notice was given by several contractors to Mr. Arthur Johnson that the union was no longer meeting the manning goals and thus was no longer in compliance with its "Affidavit for Certification."

3. This compliance controversy arose in large part because the union had begun using an "out of work" list rotation system for worker referral to the various city construction projects. This system was adopted on or around January of 1976. Prior to that time the union had operated referrals for at least thirty years without use of an "out of work" list referral system.

4. No notice of the list's adoption was given to the City Manager or to his designees at the time of its adoption. The City's initial knowledge of the list's existence came on February 8, 1977 as the result of a meeting between Mr. Johnson's representative and the union and its Attorney.

5. Prior to the early months of 1977 the union had been able to comply with its "Affidavit for Certification" because the Union did not follow the "out-of-work" list referral system.

6. In view of the present make-up of the "out of work" list, its strict use as a referral system by the union will make compliance with the union's "Affidavit for Certification" impossible.

Conclusion:

The union's position has been evaluated by this Committee solely on the basis of its efforts to comply. The Affirmative Action Ordinance makes clear that the burden of showing good faith effort to comply rests squarely with the union.

In view of the fact that the union currently is not meeting the minority manning goals it pledged to meet in its "Affidavit for Certification," and in view of our finding that strict use of the "out of work" list virtually

precludes compliance with that affidavit, the committee finds and concludes that use of the "out of work" list is clear evidence of lack of good faith effort to comply on the union's part.

The union has not demonstrated that it is making a good faith effort to comply with its affidavit, and in view of the absence of any showing of good faith effort, the above-established non-compliance cannot be excused. Thus, the committee must find the union out of compliance with its "Affidavit for Certification."

Pursuant to these findings, the committee hereby gives the union 30 days in which to comply with its affidavit or to show a good faith effort to comply. Absent such positive determinations after the expiration of the 30 day period, the committee will act to declare the union out of compliance, and will decertify the union. Such decertification will render the union ineligible to participate in city construction or improvement projects pending a showing of compliance or good faith effort to comply, in which case certification will be reconsidered by the committee.

CONTRACT ENFORCEMENT COMMITTEE

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Filed December 26, 1978

LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS	:	
v.	:	CIVIL ACTION NO. H77-167
CITY OF HARTFORD, CITY MANAGER OF THE CITY OF HARTFORD, COMMISSIONER ON HUMAN RELATIONS OF THE CITY OF HARTFORD, CONTRACT ENFORCEMENT COMMITTEE OF THE CITY OF HARTFORD and RONALD FLETCHER, individually and as Senior Field Representative of the Committee on Human Relations of the City of Hartford	:	

JUDGMENT

The above-identified action came on for consideration by the Court by the Honorable M. Joseph Blumenfeld, United States District Judge, of the parties' Cross-Motions for Summary Judgment; and,

The Court, after a hearing on the parties' Motions and after consideration of all materials submitted in connection therewith, filed its Ruling thereon ordering that Judgment enter for the Defendants;

It is therefore accordingly ORDERED and ADJUDGED that Judgment enter and hereby does enter for the Defendants.

Dated at Hartford, Connecticut, this 28th day of December, 1978.

Sylvester A. Markowski
Clerk, United States District Court

By: /s/
Chief Deputy

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Filed September 3, 1980

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of September, one thousand nine hundred and eighty.

Present: HON JAMES L. OAKES
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges

HON. EUGENE H. NICKERSON
District Judge

LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Plaintiff-Appellant

v.

CITY OF HARTFORD, CITY MANAGER OF THE CITY OF HARTFORD, COMM. ON HUMAN RELATIONS OF THE CITY OF HARTFORD, CONTRACT ENFORCEMENT COMMITTEE OF THE CITY OF HARTFORD, AND RONALD FLETCHER, individually and as SENIOR FIELD REPRESENTATIVE OF THE COMM. ON HUMAN RELATIONS OF THE CITY OF HARTFORD.
Defendants-Appellees

79-7253

A petition for a rehearing having been filed herein by counsel for the Appellant Local Union No. 35, OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.

Upon consideration thereof, it is Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Filed September 3, 1980

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 3rd day of September, one thousand nine hundred and eighty.

---X

LOCAL UNION NO. 35, IBEW
Plaintiff-Appellant

vs.

CITY OF HARTFORD, ET AL
Defendants-Appellees

---X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Local Union No. 35, IBEW and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Wilfred Feinberg
Chief Judge

ARTICLE X. AFFIRMATIVE ACTION PLAN

DIVISION 1. GENERALLY

Sec. 2-321. Purpose.

This article is adopted for the purpose of insuring equal employment opportunity for minority group persons and women in all phases of construction work, including the bidding process, performed pursuant to major contracts offered and awarded by the city under the provisions of the Charter and this Code. (Code 1960, §2-1-76; Ord. No. 35-74, §1, 11-25-74; Ord. No. 8-75, §1, 4-14-75).

Sec. 2-322. Legislative policy and findings.

It is declared and found that:

(a) Many contractors, labor unions, hiring halls, crafts and trades in the construction industry in the Greater Hartford Area have discriminated, and continue to discriminate, against minority group persons and women.

(b) It is the intention of the city not to aid or abet such discrimination by awarding contracts to contractors who practice or have practiced discrimination against minority group persons and women, or who have subcontracted to, or engaged the services of, individuals and organizations that deny or have denied equal employment opportunity to minority group persons and women.

(c) The continuing effects of past and present discrimination against minority group persons and women by the construction industry may be prevented, mitigated and/or eliminated by an affirmative action plan.

(d) There is a sufficient number of qualified minority group workers and women in the Greater Hartford Area to make such an affirmative plan feasible and desirable.

(e) The normal employee attrition and anticipated growth in the construction industry are such that an affirmative action plan will not adversely affect the existing labor force.

(f) A contractor who refuses to agree to, and comply with, an affirmative action plan designed to effectuate the purpose of this article, is precluded from being a "responsible bidder" as that term is used in the Charter and this Code.

(g) The Thirteenth and Fourteenth Amendments to the United States Constitution, Article 1, Section 20 of the Constitution of the State of Connecticut, 42 United States Code, Section 1981, 42 United States Code, Section 2000(e), Presidential Executive Order Numbers 11246 and 11375, the Governor's Executive Order Number 3, and Chapter II, Sections 5 and 7 and Chapter VIII, Section 11 of the Charter authorize and mandate that the city adopt an affirmative action plan to be incorporated in all major construction or improvement contracts to insure that no public funds are used to promote, maintain or effectuate the denial of equal employment opportunity. (Code 1960, §2-176; Ord. No. 35-74, §2, 11-25-74; Ord. No. 8-75, §2, 4-14-75).

Sec. 2-323. Definitions.

For the purpose of this article, the following words and phrases shall have the meanings hereinafter set forth except where such terms are used in a context which clearly indicates to the contrary:

Construction work includes, but is not limited to, demolition, repair, alteration, rehabilitation and construction of residential, commercial, industrial and institutional buildings, sidewalks, curbs, streetwork and other structures or public facilities.

Good faith effort means every reasonable attempt to comply with the provisions of this article and the Hartford Affirmative Action Plan and every possible measure to achieve the level and participation of minority group and female workers and trainees established by the plan has been taken.

Minority group person means a person of Black, Puerto Rican, Spanish-American, Oriental or American Indian ethnic or racial origin and identity. For purposes of this article, the term "minority group persons" shall also include women.

Organizations include the following trades, labor organizations and all subcontractors working in or connected with the construction industry: Bricklayers, carpenters, lathers, operating engineers, painters, glaziers, roofers, iron workers, teamsters, asbestos workers, boilermakers, electrical workers, elevator constructors, plumbers, sheet metal workers, steamfitters, pipe fitters, laborers' unions, tile setters, and any other groups involved in construction work. For purposes of this article, the term "organizations" shall include vendors of construction materials who employ at least fifteen (15) individuals).

Qualified means skilled in a craft or trade or available for training in a craft or trade.

Women includes women of all races and ethnic groups. (Code 1960, §2-176; Ord. No. 35-74, §4, 11-25-74; Ord. No. 8-75, §3, 4-14-75).

Sec. 2-324. Enforcement.

Except as otherwise provided, the city manager, or his or her designee, shall be responsible for the administration and enforcement of this article. (Code 1960, §2-176; Ord. No. 35-74, §4, 11-25-74; Ord. No. 8-75, §4, 4-14-75).

Sec. 2-325. Adoption of plan.

The council shall adopt by resolution an affirmative action plan to be known as the Hartford Affirmative Action Plan. Said plan will be incorporated into all capital construction and improvement bid proposals and contracts involving the expenditure of at least ten thousand dollars ($10,000.00) for construction work in the fields of public works and housing. Said plan and any amendments thereto, may be adopted only after certification by the corporation counsel that the plan and/or amendments will meet all of the following standards:

(a) Establishes reasonable minimum percentage goals for minority group and female employment in the construction industry, considering the extent of past and present discrimination and the qualified minority group and female labor force in the Greater Hartford Area;

(b) Contains provisions that will insure strict compliance with the provisions and intent of this article:

(c) Is designed to mitigate and eliminate the barriers to equal employment opportunity without delay; and

(d) Provides that noncompliance will be considered a breach of contract and subject to meaningful sanctions that insure that public funds do not directly or indirectly aid discriminatory acts of contractors and organizations.

Nothing herein shall be construed as prohibiting the court of common council from modifying said plan when such modification is necessary as a condition to receiving state or federal moneys for construction projects or improvements. (Code 1960, §2-176; Ord. No. 35-74, §5, 11-25-74; Ord. No. 8-75, §5, 4-14-75).

Sec. 2-326. Notice to bidders.

All notices to prospective bidders published on behalf of the city shall include as a part of the contract, specifications that all bidders shall be required to

comply with the provisions of this article. (Code 1960, §2-176; Ord. No. 35-74, §6, 11-25-74; Ord. No. 8-75, §6, 4-14-75).

Sec. 2-327. Responsibility of prime contractors.

(a) Prime contractors, as a condition of their contracts, shall be responsible for the proper submission to the city manager, or his or her designee, of proof or documentation in accordance with procedures prescribed by this article and Hartford's affirmative action plan regarding compliance by all their subcontractors, and, further, for the subsequent performance thereunder by such contractors. All contractors shall submit, not later than thirty (30) days after the submission of their bids, affidavits signed by all subcontractors and officials of all organizations with which they have referral arrangements or agreements covering workers to be employed on the project involved, which affidavits shall incorporate such subcontractors and organizations into the affirmative action plan. In the event any such subcontractor or organization refuses to submit such affidavit, the prime contractor shall include the name and address of each such subcontractor or organization with his or her bid; and, except as provided in section 2-328, the city manager, or his or her designee, shall submit such information with his or her recommendations to the contract enforcement committee hereinafter established, and said committee may certify that such subcontractor or organization is disqualified from participating in the performance of said contract or any future contract unless and until such party satisfactorily complies with the above requirements.

(b) Such statements, as referred to in subsection (a), shall be required of all subcontractors and organizations subsequently employed by the prime contractor after his or her bid is submitted; and if any subcontractor or organization refuses to issue such statements, the prime contractor is prohibited from employing his, her or its services in performing his contractual duties. (Code 1960, §2-176; Ord. No. 35-74, §7, 11-25-74; Ord. No. 8-75, §7, 4-14-75).

Sec. 2-328. Certification.

(a) If an organization which performs substantial construction work beyond the Greater Hartford Area declines to submit the affidavit referred to above, the city manager, or his or her designee, may certify that such organization be allowed to participate in the construction work required by a city contract. The city manager or his or her designee, shall not consider certification unless and until such organization has submitted the following documents and data:

(1) The number and classification of minority group persons and women who are members of or employed by such organization.

(2) The percentage of members, employees, and/or trainees of such organization who are minority group persons and women in both the Greater Hartford Area and the total area within the jurisdiction of such organization.

(3) The percentage of members, employees, and/or trainees of such organization who are minority group persons and women within each trade or training program within such organization in both the Greater Hartford Area and the total area within the jurisdiction of such organization.

(4) The total area within which such organization performs construction work.

(5) An affidavit by an authorized official of such organization stating it will not practice discrimination in the future in regard to minority group individuals and women and will eliminate any continuing effects of past discrimination.

(6) An affidavit by an authorized official of such organization stating that it agrees with Hartford's affirmative action plan and will make a good faith effort to comply with its provisions.

(7) An affidavit by an authorized official of such organization indicating the specific number of new minority and female journeymen or apprentices it expects to admit during the next twelve (12) months.

(b) The city manager shall certify such organization only if he makes the following findings:

(1) The organization's nature, number of employees and scope of employment are such that it cannot reasonably be expected to adopt Hartford's affirmative action plan as a contractual provision;

(2) Public funds will not be used, directly or indirectly, to promote or maintain discrimination against minority group persons and women as a result of such certification; and

(3) The documents and data submitted clearly indicate that such organization has accepted, is accepting or will in the immediate future be accepting adequate minority group and women participation in its operations.

(c) Any person aggrieved by the city manager's decision to certify or not to certify an organization may appeal such decision to the contract enforcement committee. The contract enforcement committee shall have a public hearing after providing notice in a newspaper of substantial circulation in the Greater Hartford Area. The contract enforcement committee may overrule the city manager's determination by majority vote. At all times during such proceedings, the burden of proof will be on the party challenging the city manager's determination.

(d) If the city manager, or his or her designee, determines that any organization certified under subsection (a) is not in compliance with any affidavit submitted, or has submitted inaccurate data, a public

hearing will be held by the contract enforcement committee consisting of at least three (3) members of the council, duly designated by the council. Said committee shall establish its own bylaws and procedures. Before any public hearing is held, notice thereof shall be published in a newspaper of substantial circulation in the Greater Hartford Area. If such committee determines by majority vote that the certified organization is not in compliance with its affidavits and/or has submitted false or misleading data, it may authorize any or all of the following actions:

(1) Cancel, terminate or suspend any further construction work to be performed by such organization under the contract;

(2) Declare that such organization is ineligible for further city contracts until it fully complies with its affidavits and/or provides accurate data;

(3) Publish, or cause to be published, the name of such organization in a newspaper of substantial circulation in the Greater Hartford Area; and

(4) Any further measures necessary to effectuate the purpose of this article. (Code 1960, §2-176; Ord. No. 35-74, §8, 11-25-74; Ord. No. 8-75, §8, 4-14-75).

Sec. 2-329. Job referral banks.

For the purpose of assisting in the placement of minority and female workers, the council shall designate by resolution one or more public or private agencies as job referral banks for minority and female workers, contractors and subcontractors. Said job referral banks shall compile lists by trades of all qualified minority group and female workers in the Greater Hartford Area for construction work, and shall make such lists available to any contractor or organization upon request. The city manager, or his or her designee, shall inform all contractors bidding for and/or receiving city contracts, of the name and address of all agencies so designated.

(Code 1960, §2-176; Ord. No. 35-74, §9, 11-25-74; Ord. No. 8-75, §9, 4-14-75).

Sec. 2-330. Compliance.

(a) Whenever the city manager, or his or her designee, determines that a contractor or organization, other than an organization certified under section 2-328, has failed to meet the goals established by Hartford's affirmative action plan or to comply with other provisions of the plan, there shall be a presumption that such contractor or organization has breached the city contract awarded. The city manager, or his or her designee, shall, by certified mail, notify the contractor or organization of his or her findings and may cancel the contract or withhold payments due thereunder. The contractor or organization may appeal the decision of the city manager to the contract enforcement committee within ten (10) days from the date of notification of the city manager's decision by written notice of appeal. Upon the request of the contractor or organization, the contract enforcement committee shall hold a public hearing on such appeal. At all times during the proceedings of the appeal, the burden of proving compliance with this article and Hartford's affirmative action plan will be on the contractor or organization. During the pendency of the appeal, the decision of the city manager, or his or her designee, shall remain in full force and effect. If the contract enforcement committee sustains the appeal of the contractor or organization by majority vote, the contract, if canceled, may be reinstated or any payment withheld ordered paid to the contractor.

(b) In the event the contract enforcement committee sustains the city manager, or his or her designee, by majority vote, it may authorize any or all of the following actions:

(1) Reaffirm the action taken by the city manager, or his or her designee.

(2) Institute any further action, including but not limited to, canceling, terminating or suspending any future contract work to be performed by such contractor or organization under the contract, declaring such contractor or organization ineligible for future city contracts until it fully complies with this article and Hartford's affirmative action plan, and publishing or causing to be published the name of such contractor or organization in a newspaper of substantial circulation in the Greater Hartford Area.

(c) The contractor or organization shall be liable for any and all damages, losses or delays as a result of any determinations made by the city manager, or his or her designee, or by the contract enforcement committee, that such contractor organization has failed to comply with the provisions of this article. All contracts entered into between the city and any contractor or subcontractor shall provide that the city shall not be liable for any of such damages, losses or delays. (Code 1960, §2-176; Ord. No. 35-74, §10, 11-25-74; Ord. No. 8-75, §10, 4-14-75).

Sec. 2-331. Tax abatement contracts.

The committee on abatement of taxes and assessments shall not, pursuant to the provisions of section 31-12 of this Code, enter into any contract for the abatement of taxes with the owner of any proposed housing or rehabilitation project unless the contractor employed to construct said project agrees to comply fully with the provisions of this article; provided, however, that the provisions of this section shall not apply if the project has been commenced prior to the effective date of this ordinance, or if the committee unanimously waives the applicability of this section. This subsection shall not apply to any tax abatement project involving the expenditure of less than twenty thousand dollars ($20,000.00) or involving the construction or rehabilitation of six (6) dwelling units or less. (Code 1960, §2-176; Ord. No. 35-74, §11, 11-25-74; Ord. No. 3-75, 2-27-75; Ord. No. 8-75, §11, 4-14-75).

Sec. 2-332. Properties receiving city loans and tax benefits.

The provisions of this section shall apply to all contracts for the construction, reconstruction, improvement, alteration or repair of any development property, as that term is defined under Public Act 75-2, performed for the city, or any delegatee of the city, or any private sponsor who receives a loan or tax benefit from the city under the provisions of said act. All public and private contracts for the development, redevelopment, improvement, alteration or repair of any property within the city which will be subject to a city tax benefit, authorized under the provisions of any state statute, shall also be subject to the same affirmative action conditions contained herein. The provisions of this section and the Greater Hartford Affirmative Action Plan shall be incorporated into all contracts subject to this subsection. This subsection shall not apply to any project involving the expenditure of less than twenty thousand dollars ($20,000.00) or involving the construction or rehabilitation of six (6) dwelling units or less. (Ord. No. 8-76, 2-9 76).

Sec. 2-333. Purchases by city without bids to be awarded to equal opportunity employers.

All purchases by the city for which bids are not solicited shall be awarded only to equal opportunity employers in accordance with standards prepared by the city manager and approved by the court of common council. Between two (2) equal prices for the same quality goods or services, preference shall be accorded to a city-located business over a noncity-located business, and a state-located business over a nonstate-located business. (Ord. No. 12-75, 5-12-75).

Editor's note — Ord. No. 12-75, adopted May 12, 1975, did not specifically amend the Code. Codification herein as §2-333 was, therefore, at the discretion of the editor.

Charter reference — Competitive bidding, Ch. VIII, §10.

Secs. 2-334 — 2-343. Reserved.

DIVISION 2. PROFESSIONAL SERVICES

THE GREATER HARTFORD AFFIRMATIVE ACTION PLAN

PREAMBLE

THIS AGREEMENT, entered into as of the day of , 197 , is by and between the City of Hartford and all contractors and organizations, as defined herein, in the construction industry which are or will become signatories to this Agreement.

This Agreement is to be implemented in accordance with the affirmative action mandate of the Thirteenth and Fourteenth Amendments to the United States Constitution, Article 1, Section 20 of the Constitution of the State of Connecticut, 42 United States Code, Section 1981, 42 United States Code, Section 2000(e), Presidential Executive Order Numbers 11246 and 11375, the Governor's Executive Order Number 3, Chapter II, Sections 5 and 7, the Chapter VIII, Section 11 of the Charter of the City of Hartford, and Hartford's Equal Employment Opportunity Contract Compliance Ordinance (hereinafter called Ordinance), a copy of which is attached hereto.

Any contractor or organization which refuses to sign this Agreement is prohibited from participating in any City construction or improvement project, unless such contractor or organization is certified in accordance with the certification procedures of the Ordinance.

This Agreement is hereby incorporated into all contracts for City construction work between the City and the signatories hereto, as if fully stated as a contractual provision. A breach of this Agreement shall constitute a breach of all such contracts, and be subject to all remedies provided by the contract, the Ordinance and the law for breach.

Section 1. PURPOSE

The parties to this Agreement intend to ensure equal employment opportunity for minority group persons, including women, as defined herein, in all phases of construction work performed pursuant to major contracts awarded by the City of Hartford (hereinafter called City) under the provisions of its Municipal Charter and Code.

Section 2. COVERAGE

This Agreement shall apply to all public building and construction work, Federal, State or local, and to all private building and construction work, union or non-union, which is undertaken in the geographic area of this Plan.

Section 3. PARTIES

The parties to this Agreement shall be divided into four categories. Category A shall include general contractors, subcontractors, specialty contractors, vendors of construction material, and/or any associations which represent them. Category B shall include local union organizations and representatives of non-union labor, and may include regional councils and associations, internal associations or organizations of local union organizations. Category C shall include the City Manager, or his or her designee. Category D shall include representatives of minorities and women in the field of construction work.

Section 4. DEFINITIONS

A. The definitions of the terms "construction work," "good faith effort," "minority group persons," "organizations" and "qualified" shall be those used in the Ordinance.

B. In addition, the following words and phrases shall have the meanings hereinafter set forth except where such terms are used in a context which clearly indicates to the contrary:

1. "Applicant" includes any person who appears at a job site or office of Category A or B party, seeking employment on a project or projects covered by this Agreement or membership to such party, or one who is listed with any job referral bank so designated by the Court of Common Council of the City pursuant to the Ordinance.

2. "Craft" or "construction industry craft" means a category of skill corresponding to any group of workers employed in the construction industry.

3. "General Construction Trades" includes, but is not limited to, the following trades: bricklayers, carpenters, lathers, operating engineers, painters, glaziers, roofers, iron workers, teamsters and laborers; plus any work under which the respective craft has jurisdiction.

4. "Hartford Labor Market Area" includes the following cities and towns: Avon, Bloomfield, Bolton, Canton, East Granby, East Hartford, East Windsor, Ellington, Enfield, Glastonbury, Granby, Hartford, Manchester, Rocky Hill, Simsbury, Stafford, Somers, South Windsor, Tolland, Vernon, West Hartford, Wethersfield, Windsor and Windsor Locks. It is noted that the coverage of this Plan may vary according to trade jurisdictional territory.

5. "Job Classification" includes, but is not limited to, journeyman, trainee, apprentice or pre-apprentice, as those terms are commonly used and understood in the construction industry or are given meaning in Section 7 below.

6. "Staffing Table" means a chart which sets forth the goals and time tables of each organization in regard to the employment of minority and nonminority personnel. Each such chart shall include a list of the job classifications in each craft and the number of persons to be employed or enrolled in each craft in each job classification.

7. "Mechanical Trades" includes, but is not limited to, the following trades: asbestos workers, boilermakers, electrical workers, elevator constructors, plumbers, sheet metal workers and steamfitters - pipefitters; plus any work under which the respective craft has jurisdiction.

8. "Resident of the Hartford Labor Market Area" means any person who is currently a resident of the Hartford Labor Market Area.

9. "City Project" includes all phases of construction work in public works and improvements and housing involving the expenditure of at least Ten Thousand ($10,000.00) Dollars for which the City has contracted or will contract pursuant to competitive bidding, or without competitive bidding, if authorized by a State or federal statute. Tax abatement projects will fall within the purview of Section 11 of Section 2-176 of the Municipal code shall be considered City projects. All other projects shall be considered non-City projects.

Section 5. EMPLOYMENT OF MINORITY WORKERS

A. The parties specifically agree to make every good faith effort to achieve during the period of years established in this Agreement, a level and membership and employment of minority group employees, including women, to at least fifteen (15%) per cent. It is recognized by all parties to this Agreement that the employment of women shall not be restricted to any one racial or ethnic group. The percentage goals and the period of

time during which these goals are to be achieved shall be not less than one year, nor greater than five years, as determined by the Category C party after consultation with Category A, B and D parties. The following criteria shall be applied in determining the percentage goals for minorities and women to be trained and employed within each craft under this Agreement: (1) the extent of past and present discrimination within the craft; (2) the qualified minority and female labor force in the Hartford Labor Market Area; and (3) the jurisdictional area of the craft.

B. During any period of time that the signatories to this Agreement have not met their interim goals for minorities and/or women, they shall employ said personnel into their respective organizations at a minimum rate of fifty (50%) per cent of all new entrances, as determined by the Category C party after consultation with Category A, B and D parties. The only exception from this provision is "specialists." A definition of "specialists" shall be adopted by the Administration Committee, and subject to the approval of the Category C party.

C. The goals established during the period of this Agreement shall be governed by a staffing table established by the Category C party after consultation with Category A, B and D parties. Such interim goals, as established pursuant to this Plan, shall be limited to no less than three month periods.

D. The Category C party, after consultation with Category A, B and D parties, shall set minimum participatory goals on City projects for minority personnel, including women. Such goals shall be at least fifteen (15%) per cent of the daily (manhours) worked by each trade on each project. The contractor and his labor referral union or organization will bear the responsibility to achieve these minimum goals.

In those cases, wherein several contractors employ the same trade on a project, the minimal fifteen (15%) per cent daily trade participation will apply to the overall project manning. In these special cases, the contractors and the union shall collectively assume the responsibility to achieve the fifteen (15%) per cent minimal participatory goals. Contractors unable to achieve the fifteen (15%) per cent minimal trade participation within their crew shall state in writing their attempts and reasons for not being able to do so to the Category C party.

The Category A and B parties agree to make a good faith effort to implement these goals on non-City projects. For purposes of this Agreement, any tax abatement projects which fall within the purview of the Ordinance shall be considered a City project subject to the minimum participatory goals of minority personnel including women. The parties herein agree that the Category C party and the administration coordinator shall be allowed to visit and inspect non-City projects at reasonable times to insure the implementation of this provision.

Section 6. IMPLEMENTATION

A. All parties to this Agreement recognize that in accordance with the Ordinance the Category C party shall be primarily responsible for the monitoring and enforcement of this Agreement.

B. To advise and assist the Category C party in the implementation and operation of this Agreement, there shall be an Administration Committee.

1. The Administration Committee shall be comprised of twelve (12) members as follows:

Four (4) representatives to be selected by Category A party;

Four (4) representatives to be selected by Category B party; and

Four (4) representatives of the Category D party to be selected by organizations representing minorities and women.

2. At least one of the representatives selected by the Category A party shall be a representative of major vendors of construction material. At least one of the representatives selected by the Category A party shall be a minority contractor.

3. At least one of the representatives selected by the Category B party shall be a representative of non-union labor.

4. The terms of the representatives to the Administration Committee shall be for two year periods, provided that two of the representatives from each category of parties chosen to the first Administration Committee so constituted shall serve for one year terms.

5. The Administration Committee shall choose its own chairperson, by majority vote, who shall maintain his or her vote at all times.

6. The Category C party shall contact representatives of the Category A, B and D parties upon the adoption of this Agreement for the purpose of notifying said parties that they have no more than 45 days to select their initial representatives to the Administration Committee, and the Craft Operations Committees, hereinafter established. If any party has failed to select their representatives at the expiration of the 45 day period, the Contract Enforcement Committee, established by the Ordinance, may appoint such representatives or may take any other action which it deems appropriate to insure full, fair and equitable representation on the Administration Committee.

7. Any person aggrieved by the make-up of the Administration Committee may appeal to the Category C party. The Category C party shall, if he or she finds said Committee not to be representative of the parties involved, take appropriate action to insure adequate representation. The decision of the Category C party may be appealed to the Contract Enforcement Committee, whose decision shall be binding on all parties.

8. The Category C party shall have the right to attend and speak at all special and general meetings and executive sessions of the Administration Committee, but shall not have any voting privileges.

9. The Administration Committee shall adopt its own by-laws, which by-laws shall not be inconsistent with the provisions of this Agreement. The Administration Committee shall meet at least monthly at such times and places as it shall designate. The Chairperson shall have the power to call such special meetings as he or she deems desirable, provided, however, that he or she provides at least 24 hours notice of such meetings to all Committee members, unless a member of each of the four parties listed in subsection B. 1. of this section waives such notice requirement. A quorum for the transaction of business by the Administration Committee shall consist of at least three (3) members thereof present, which three (3) members shall include at least one (1) representative from each of the three parties listed in subsection B. 1. Once a quorum has been established, each represented Category of parties shall be permitted to cast the number of votes equal to their number of representatives on the Administration Committee without regard to the number of representatives present from each category of parties. A majority of votes so cast shall be necessary for the taking of action by the Committee.

10. The duties of the Administration Committee shall include the following:

a. To provide the Category C party with the consultation and information he or she deems necessary for the successful implementation of this Agreement.

b. To make such recommendations to ensure the successful implementation of this Agreement as it deems necessary.

c. To establish a nonprofit corporation for the securing of funding for the monitoring of the overall program. The members of the Administration Committee shall serve on the Board of Directors of any such corporation organized.

d. To enter into contracts and agreements with government agencies, individuals, community action agencies or other resource groups to carry out any phases of the program.

e. To supervise the Craft Operations Committees.

f. To mediate and arbitrate any complaints or grievances concerning programs developed by a Craft Operations Committee, which mediation and arbitration shall be final and binding in accordance with law.

g. To prescribe fair and equitable methods for the selection of members and alternates, so as to insure that the membership on said Committee is truly representative.

C. There shall be two Craft Operations Committees, one for the General Construction Trades and one for the Mechanical/Electrical Trades.

1. The Craft Operations Committees will have as duties assigned to them, the classification of applicants, the establishment of training programs and such other responsibilities as may be assigned by the Administration Committee.

2. Representation on the Craft Operations Committees shall be as follows:

a. General Construction Trades, Craft Operations Committee:

Two (2) representatives from Category A party who are General Contractors.

Two (2) representatives from Category B party who are members of the General Construction Trades.

Two (2) representatives of the Category D party.

b. Mechanical/Electrical Trades, Craft Operations Committee:

Two (2) representatives from Category A party who are contractors in any of the Mechanical Trades.

Two (2) representatives of the Category B party who are members of the Mechanical Trades.

Two (2) representatives of the Category D party.

3. At least one of the representatives selected by the Category A party to the Craft Operations Committees shall be a minority contractor.

4. Each Craft Operations shall elect a committee member as Chairperson, who shall maintain his or her vote at all times. Each Chairperson shall serve for a term of six months. On a rotating basis, each of the three parties shall in turn select the meeting Chairperson.

5. Representatives on the Craft Operations Committee from each category of parties may be rotated, at the discretion of the respective parties.

6. A quorum for the transaction of business by the Craft Operations Committees shall consist of at least three (3) members thereof present, which three (3) members shall include at least one (1) representative from each of the three categories of parties listed in subsection C. 2. of this section. Once a quorum has been established, each represented category of parties shall be permitted to cast the number of votes equal to their number of representatives on the Craft Operations Committee without regard to the number of representatives present from each category of parties. A majority of votes so cast shall be necessary for the taking of action by the Craft Operations Committee.

7. Each Craft Operations Committee shall adopt their own by-laws, which by-laws will not be inconsistent with provisions of this Agreement.

8. Each Craft Operations Committee shall prescribe fair and equitable methods for the selection of members and alternates, so as to insure that the members of said Committee are truly representative.

9. The Category C party shall have the right to attend and speak at all special and general meetings and executive sessions of the Craft Operations Committees, but shall not have any voting privileges.

10. The terms of the representatives to each Craft Operations Committee shall be for two year periods, provided that one of the representatives from each category of parties chosen to the first Craft Operations Committee so constituted shall serve for a one year term.

D. Notice of all meetings and sessions of the Administration Committee and the Craft Operations Committees shall be sent to the Category C party.

E. It is recognized by all parties to this Agreement that other political subdivisions within the Greater Hartford Region may desire to become signatories to the Greater Hartford Affirmative Action Plan. To facilitate meaningful participation by such signatories, a Regional Council is hereby constituted.

1. The Regional Council shall consist of one duly authorized representative from each political subdivision, which is a signatory to this Agreement. The representative from the City of Hartford shall be the Category C party.

2. Each representative on the Regional Council shall have the responsibility to establish minimum participatory goals of minorities and women on town projects within his or her jurisdiction, which goals shall be consistent with the extent of the available qualified minority and female labor force in the Hartford Labor Market Area.

3. The Regional Council shall adopt its own by-laws and shall meet at such times and places as it deems desirable, provided, however, that there shall be at least one meeting per month.

4. The Regional Council shall make such recommendations to the Category C party as it deems necessary or desirable.

5. The Category C party shall make available to the Regional Council all information which he or she receives pursuant to this Agreement.

6. The Category C party shall consult with the Regional Council on all matters necessary or desirable for the successful implementation of this Agreement.

7. The Regional Council may appeal any decision of the Category C party which is contrary to its recommendations to the Contract Enforcement Committee established in the Ordinance.

8. The Regional Council may establish a non-profit corporation to secure funds for the monitoring of this Agreement.

Section 7. CLASSIFICATION AND TRAINING

A. To facilitate the implementation of the desired goals of this Agreement, Category A and B parties agree to the following classifications of qualifiable applicants, which shall hereinafter apply to all tradesmen, minority and non-minority.

1. Journeyman.

a. An applicant who is licensed by the State of Connecticut to perform the functions of a licensed craft included in this Agreement.

b. An applicant who:

1. has in fact functioned as a journeyman in a craft included in this Agreement and submits evidence of such to the Craft Operations Committee, regardless of union membership or nonmembership; or,

2. meets the minimum qualifications of the journeyman listed on the active rolls of a union with jurisdiction covering a craft included in the Agreement;

3. and, has demonstrated journeymen skill during a probationary period on the job as determined by the Craft Operations Committee, but not to exceed six (6) months;

4. and is licensed where required by law.

2. Advanced Trainee.

All applicants who are not classified as journeymen, who have had some construction work experience in the particular field involved, or its equivalent, and who, in the judgment of the Craft Operations Committee, require one year or less of job related training to qualify as journeymen - or to obtain a license for those trades which require a license, but who do not meet the requirements or do not seek admission to Apprenticeship Programs, shall be classified as Advanced Trainees. Advanced trainees shall be placed in job related training programs in accordance with the goals for minority or female employment outlined in Section 5 above.

3. Trainee.

All applicants who do not possess the qualifications for classification as journeymen, advanced trainees or apprentices shall be classified by the Craft Operations Committee as Trainees. No Craft Operations Committee shall classify a minority or female applicant as a trainee without the express consent of the Joint Apprenticeship Committee, unless that craft, as determined by the Administration Committee, is failing to maintain the levels of minority or female employment as outlined in Section 5. Trainees shall be placed in job related training programs in accordance with the goals for minority or female employment as set forth in Section 5.

4. Apprentice.

All applicants who possess the established experience equivalency or who meet the valid established qualifications for Apprentice Programs, and who desire to become apprentices, shall be classified by the Craft Operations Committee as apprentice applicants. The Craft Operations Committee shall consider applicants who are over age on a case by case basis. Such applicants shall be admitted into the Registered Apprenticeship Program of the trade for which they have been

determined to be qualified. Employment of minority or female applicants in the Apprenticeship Programs for the designated trades shall count toward fulfillment of the goals for minority or female employment for each calendar year as set forth in Section 5 of this Agreement.

5. Pre-Apprentice.

All applicants who meet the age requirement for Apprenticeship programs and desire to become apprentices, but who do not meet the other valid, established qualifications for Apprenticeship programs, shall classify as pre-apprentice.

B. Guidelines for Trainee and Apprentice Classifications.

1. All applicants classified as advanced trainees will be advanced to journeymen status as soon as possible but may remain in a training status for a maximum of one year. Training will include on the job training as an employee of Category A party to this Agreement and such related instructions as may be required in order to qualify as a journeyman. Qualifications as a journeyman shall be determined by the Craft Operations Committee in accordance with guidelines set forth in Paragraph A. 1. of this Section.

2. Minority or female applicants classified as trainees will be advanced to journeymen status upon completion of training programs outlined by the Craft Operations Committee. Training will include on the job training as an employee of Category A party to this Agreement and such related instructions as may be required in order to qualify as a journeyman. However, no training program shall extend beyond the maximum training period required by the Joint Apprenticeship Committee. Qualifications as a journeyman shall be determined in accordance with guidelines set forth in Paragraph A. 1. of this Section.

3. All apprentice applicants shall be subject to the training and qualification guidelines set forth by federal and state requirements for registered apprenticeship programs. The Joint Apprenticeship Committee shall make the final selection of Apprentices.

4. All applicants classified as pre-apprentices, shall be admitted to a registered apprenticeship program upon completing training to qualify them to meet established qualifications for Apprenticeship programs.

5. All advanced trainees, trainees and apprentices completing the required training programs and fulfilling all of the requirements for journeyman status shall be afforded the opportunity for full membership as a journeyman by the appropriate Category B party to this Agreement.

C. Employment as Journeyman.

When any person who is an applicant is classified as a journeyman in accordance with subsection A above, he or she shall be referred to an applicable Category A party for employment in accordance with the goals for minority or female employment outlined in Section 5 above; he or she shall be afforded the opportunity for full union membership as a journeyman by the appropriate Category B party to this Agreement; and he or she shall receive wages and fringe benefits applicable to journeymen as provided in applicable collective bargaining agreements.

D. Employment as Trainee.

When any applicant is classified as a trainee, such person shall be placed in job related training programs in accordance with his or her aptitude and construction work experience as determined by the Craft Operations Committee.

The trainee's classification and wages shall conform to the standards of the Joint Apprenticeship Council for the respective trade.

E. The above classifications have been adopted for the purpose of screening applicants and facilitating their advancement. No organization will be required to accept applicants who do not satisfy the qualifications necessary to perform the work for which they are employed. No organization will be required to change existing bona fide classifications.

Section 8. UTILIZATION OF MINORITY GROUP SUBCONTRACTORS

A. Minority and/or female persons who are general contractors or subcontractors regularly doing business in the Hartford Labor Market area shall be assisted wherever possible to bid and be awarded contracts in their respective trades or business.

B. In order to meet this requirement, each Category A party shall whenever possible:

1. inform associations and consortia of minority or female contractors of known bid specifications well in advance of the closing date for bid submissions;

2. actively recruit consortia of minority or female contractors to bid on subcontracts;

3. limit the size and dollar volume of subcontracts to the extent feasible and otherwise arrange solicitations, time for preparation of bids, specifications and completion dates in order to make it possible for minority or female persons who are contractors or consortia of minority or female contractors to bid and compete for said contracts;

4. provide whatever other counseling or assistance may be necessary during the preparatory stages and the actual performance of such subcontracts.

C. Upon receipt of a statement from a minority or female subcontractor that he or she is unable to obtain requisite bonding or insurance through normal channels, the Category A party shall refer the subcontractor to the Administration Committee. The Committee is authorized to establish a consortia of financial institutions for the purpose of providing necessary bonding for all subcontractors who are unable to obtain requisite bonding.

Section 9. EMPLOYMENT OF MINORITY GROUP PERSONS AS SUPERVISORY AND MANAGEMENT PERSONNEL

A. Each Category A party shall insofar as possible, hire, train and promote minority and female applicants or employees who are residents of the Hartford Labor Market Area to fill that Party's supervisory and other managerial work force employed in the performance of projects within the coverage of this Agreement on the same proportionate basis as that set forth for the crafts in Section 5 of this Agreement. For the purpose of implementing this Section, each Category A party shall submit to the Administration Committee and the Category C party an affirmative action plan with its bid. Category A parties, who are classified as vendors of construction materials, shall submit an affirmative action plan through their contractors within 30 days after becoming signatories to this Agreement or 30 days prior to supplying any materials, whichever comes first. The Category C party shall review said plans and either accept or modify them as necessary to insure equal employment opportunity.

Section 10. REPORTS AND RECORD-KEEPING

A. Each Category A party agrees to maintain written monthly reports demonstrating compliance with the requirements of Sections 5, 8 and 9 above. These reports shall be submitted to any Category B, Category C or Category D party on request.

B. Each Category A party shall make available to the Administration Coordinator the applications of those minority persons who have registered for employment. For each registration, the application should include:

1. Name.

2. Address.

3. Age.

4. Craft in which applicant seeks to be registered.

5. Whether the applicant was hired or his application forwarded for registration. These records shall be available for inspection by any Category B, C or D party on request.

6. Category A and B parties shall also maintain records with respect to the applicant flow.

C. Each Category B party shall maintain a roster or file of all persons who are members, trainees or persons who utilize the placement facilities of its union hall, providing name and job classification. Such a roster shall be compiled within 30 days after the effective date of this Agreement and shall be revised every 30 days. These records shall be available for inspection by the Administration Coordinator or Category C party on request.

D. The Administration Committee may order any or all information found necessary or desirable to aid in the implementation of this Agreement. Such records as required by this Section shall be kept confidential upon request by any party for good cause. Any disputes concerning the production or restriction of records shall be submitted to the Office of the Corporation Counsel for arbitration. The decision of the Corporation Counsel shall be binding on all parties.

Section 11. COORDINATION

A. This Agreement shall be monitored by the Administration Committee. When the Administration Committee establishes a nonprofit corporation to implement this program, as indicated in Paragraph A. 4. d., Section 6 of this Agreement, the Administration Committee shall be empowered to select one (1) full time paid staff member for the corporation to act as the Administration Coordinator and one (1) full time paid secretary. The Category C party shall nominate the person to serve as Administration Coordinator, and his or her appointment shall be subject to the approval of the Administration Committee. The Administration Coordinator shall be a resident of the Hartford Labor Market Area with expertise in the field of construction work. He or she shall serve for a term of two (2) years.

B. The Administration Coordinator shall be responsible for the day-to-day administration of the requirements of this Agreement and shall report his findings to the Administration Committee and the Category C party at least once each 30 days for as long as said Agreement is in force. (A list of the duties, responsibilities and authorities of the Administration Coordinator shall be prepared by the Administration Committee and set forth as an addendum to this Agreement.)

C. In case any Committee created in this Agreement is unable or unwilling to meet, due to lack of a quorum or other cause, the Administration Coordinator shall assume the duties of said Committee. If the Administration Coordinator is unable or unwilling to assume said duties, the Category C party shall have the power to appoint a new Coordinator. Nothing herein shall prohibit the Administration Coordinator from continuing to consult with any Committee members who are willing to participate.

Section 12. COMPLIANCE

A. Each party who is a signatory to this Agreement shall make the employment and training provisions of this Agreement an integral part of all contracts and subcontractors it writes for construction work in the area covered by this Agreement.

B. The rates of wages and fringes for all work performed for the City of Hartford shall be as prescribed by the State of Connecticut Labor Department and/or U.S. Department of Labor as the prevailing wage rates for that area. These wage rates are to be revised periodically so as to remain current with all revisions issued by the Labor Department. For purposes of this Section, any tax abatement project which falls within the purview of the Ordinance shall be considered a City project subject to the prevailing wage rate requirement.

C. The failure of any Category A or B party to comply with the terms of this Agreement shall constitute a breach of contract unless the Category A or B party shall have taken all the steps indicated in the appropriate sections above and shall have been unable to fulfill its obligations after making every good faith effort.

D. The Ordinance is incorporated herein as if fully stated.

Section 13. MISCELLANEOUS PROVISIONS

Nothing in this Agreement shall interfere with the pension plans of any organization. Nothing herein shall preclude pre-job conferences, although all parties are encouraged to extend an invitation to interested minority and female representatives to attend such conferences. It is not the intent of this Agreement to interfere with any bona fide seniority system which does not perpetuate past discrimination.

Section 14. APPEAL RIGHTS

Any party to this Agreement, including the minority and female members on any committee established herein, who is aggrieved by any decision of the Category C party, may appeal to the Contract Enforcement Committee established by the ordinance in writing within 15 days of the making of the decision. The Contract Enforcement Committee shall provide such party with a hearing and issue a decision within 30 days of the receipt of the written appeal. During the pendency of such an appeal, the decision of the Category C party shall remain in full force and effect, unless the Contract Enforcement Committee issues a stay of the decision by unanimous vote.

Section 15. DURATION AND MODIFICATION

A. This Agreement shall last for a period of five (5) years, from , 1975 through 1980, and thereafter shall be automatically reviewed from year to year, unless written notice of intention to terminate or modify the Agreement is given by any party to the Agreement to all the parties to the Agreement not more than ninety (90) or less than sixty (60) days prior to each annual renewal date.

B. Not more than ninety (90) nor less than sixty (60) days prior to each annual anniversary date, each party shall furnish the other parties, in writing, of any changes in the list of organizations it represents.

C. At least ninety (90) days prior to the end of the first, and each succeeding year of the Agreement, following the first five (5) year period, the parties shall review the effectiveness of the Plan and the adequacy of the goals set forth herein.

D. This Agreement may be amended or added to at any time by the written consent of all parties hereto.

Section 16. AGREEMENT QUALIFICATIONS

It is not the intent of any of the parties hereto to violate any laws or rulings or regulations of any government authority or agency having jurisdiction of the subject matter of this Agreement, and the parties hereto agree that, in the event any provision of this Agreement is held to be unlawful or void by any tribunal having the right to so hold, the remainder of this Agreement shall remain in full force and effect, unless the parts so found to be void are wholly inseparable from the remaining portions of the Agreement.

CITY OF HARTFORD
INTERDEPARTMENTAL MEMORANDUM

TO: COUNCILMAN RAYMOND MONTEIRO,
CHAIRMAN
COURT OF COMMON COUNCIL
CONTRACT ENFORCEMENT COMMITTEE

FROM: ARTHUR L. JOHNSON, HUMAN
RELATIONS

SUBJECT: "GREATER HARTFORD PLAN"/IBEW
LOCAL #35

DATE: FEBRUARY 28, 1977

COPY TO:

The International Brotherhood of Electrical Workers (IBEW) Local #35 was provisionally certified to be in compliance with Section 2-176:8 of the Municipal Code and the "Greater Hartford Plan" as per their signed affidavit of October 8, 1975. Paragraph 4 of that affidavit reads as follows:

> "The Local hereby agrees to comply with the contractual responsibilities regarding the manning of city of Hartford projects."

The manning responsibilities of City of Hartford projects are outlined in Sec. 5D of the "Greater Hartford Plan" which reads in part as follows:

> The Category C party (Human Relations Commission)...shall set minimum participatory goals on City projects for minority personnel, including women. Such goals shall be at least fifteen (15%) percent of the daily manhours worked by each trade on each project...

I have attached a staff report outlining a February 8, 1977 meeting with IBEW Local #35 officials as to the rotation list they are now utilizing for referral of workers to contractors performing construction work. It is apparent that the utilitization of this list by IBEW Local #35 for the referral of minority workers will be directly in conflict with the minority manning provisions for City of Hartford projects as outlined above.

I believe the above referral procedures of Local #35 to be in direct conflict with their compliance to the "Greater Hartford Plan" and recommend that the Contract Enforcement Committee of the Court of Common Council meet to consider the continued eligibility for IBEW Local #35 to participate upon City of Hartford projects pursuant to Section 2-176:8 of the Code.

INTERDEPARTMENTAL MEMORANDUM

TO: ARTHUR L. JOHNSON

FROM: RONALD FLETCHER

SUBJECT: IBEW LOCAL #35/GREATER HARTFORD PLAN

DATE: FEBRUARY 24, 1977

COPY TO:

I have attached correspondence from MAFCO Electric Company dated 1/28/77 and Associated Electric/Pep's Electric (a Joint Venture) dated 1/19/77. As you will note, both letters point out that each contractor believes that their referral agreements with IBEW Local #35 for electrical workers preempts their utilizing other sources to comply with the minority manning requirements for City projects.

In order to clarify this issue, Atty. Barry Zitser and myself met on February 8, 1977 with IBEW #35 officials (Robert Murray and Robert Murtha) and their attorney (William Zeman) to review the above as it relates to their participation in the "Greater Hartford Plan" as per their signed affidavit of October 8, 1975.

IBEW Local #35 indicated at that meeting that they were now utilizing a rotation system for referral of workers. IBEW officials further stated their position that such rotation list would take precedence over any minority manning requirements as contained in the "Greater Hartford Plan."

The following information was presented as background information:

IBEW #35	total membership	- 550
	working	- 229
	not working	- 321
	total minority	- 41
	(Black	- 31
	(Spanish-surnamed	- 5
	(American Indian	5
	minority working	- 24
	minority not working	- 17

At the present time (2/8/77), the rotation list contains 321 names. The minority workers occupy the following positions on that list (85, 94, 121, 145, 157, 166, 167, 184, 188, 204, 212, 224, 236, 238, 287, 299, 308).

It is apparent that the utilization of this list by IBEW Local #35 for the referral of minority workers will directly conflict with the minority manning provisions of the "Greater Hartford Plan" to which IBEW #35 has signed affidavits for certification.

Principal Labor Agreement Between Local Union No. 35, IBEW and National Electrical Contractors Association, Inc.

. . .

ARTICLE VII
REFERRAL PROCEDURE

Section 1. In the interest of maintaining an efficient system of production in the industry, providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interests of the employees in their employment status within the area and of eliminating discrimination in employment because of membership or non-membership in the Union, the parties hereto agree to the following system of referral of applicants for employment.

Section 2. The Union shall be the sole and exclusive source of referral of applicants for employment.

Section 3. The Employer shall have the right to reject any applicant for employment.

Section 4. The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or non-membership in the Union and such selection and referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or any other aspect or obligation of Union membership policies or requirements. All such selection and referral shall be in accord with the following procedure.

Section 5. The Union shall maintain a register of applicants for employment established on the basis of the Groups listed below. Each applicant for employment shall be registered in the highest priority Group for which he qualifies.

GROUP I. All applicants for employment who have four or more years' experience in the trade, are residents of the geographical area constituting the normal construction labor market, have passed a Journeyman's examination given by a duly constituted Local Union of the I.B.E.W. or has been certified as a Journeyman Wireman by any Inside Joint Apprenticeship and Training Committee and who have been employed for a period of at least one year in the last four years under a collective bargaining agreement between the parties to this Agreement.

GROUP II. All applicants for employment who have four or more years' experience in the trade and who have passed a Journeyman's examination given by a duly constituted Local Union or the I.B.E.W. or has been certified as a Journeyman Wireman by any Inside Joint Apprenticeship and Training Committee.

GROUP III. All applicants for employment who have two or more years' experience in the trade, are residents of the geographical area constituting the normal construction labor market and who have been employed for at least six months in the last three years in the trade under a collective bargaining agreement between the parties to the Agreement.

GROUP IV. All applicants for employment who have worked at the trade for more than one year.

Section 6. If the registration list is exhausted and the Local Union is unable to refer applicants for employment to the Employer within 48 hours from the time of receiving the Employer's request, Saturdays, Sundays and holidays excepted, the Employer shall be free to secure applicants without using the Referral Procedure, but such applicants, if hired, shall have the status of "temporary employees."

Section 7. The Employer shall notify the Business Manager promptly of the names and Social Security numbers of such "temporary employees," and shall replace such "temporary employees" as soon as registered applicants for employment are available under the Referral Procedure.

Section 8. "Normal construction labor market" is defined to mean the following geographical area plus the commuting distance adjacent thereto, which includes the area from which the normal labor supply is secured.

STATE OF RHODE ISLAND:

Washington County - Westerly Township

STATE OF CONNECTICUT

Hartford County - entire County excluding Berlin, Bristol, Hartland, New Britain, Newington, Plainville, Southington and Suffield Townships; and excluding that portion of the City of Thompsonville in Enfield Township west of George Washington Road and north of Hazard Avenue (re-located Connecticut Route 190).

Middlesex County - Townships of Cromwell, Middlefield, Middletown and Portland.

New London County - Townships of Bozrah, Colchester, Franklin, Griswold, Lebanon, Ledyard, Lisbon, Montville, North Stonington, Norwich, Preston, Salem, Sprague, Stonington, Voluntown.

Tolland County - Entire County - All Townships.

Windham County - Entire County - All Townships.

The above geographical area is agreed upon by the parties to include the areas defined by the Secretary of

Labor to be the appropriate prevailing wage areas under the Davis-Bacon Act to which this Agreement applies.

Section 9. "Resident" means a person who has maintained his permanent home in the above defined geographical area for a period of not less than *one year* or who, having had a permanent home in this area, has temporarily left with the intention of returning to this area as his permanent home.

Section 10. "Examinations" - An "examination" shall include experience rating tests if such examination shall have been given prior to the effective date of this procedure, but from and after the date of the procedure, shall include only written and/or practical examinations given by a duly constituted Local Union of the IBEW. Reasonable intervals of time for examinations are specified as ninety days. An applicant shall be eligible for examination if he has four years' experience at the trade.

Section 11. The Union shall maintain an "Out of Work List" which shall list the applicants within each Group in chronological order of the dates they register their availability for employment.

Section 12. An applicant who has registered on the "Out of Work List" must renew his application every thirty days or his name will be removed from the "List."

Section 13. An applicant who is hired and who receives, through no fault of his own, less than forty hours work, shall, upon re-registration, be restored to his appropriate place within his Group.

Section 14. Employers shall advise the Business Manager of the Local Union of the number of applicants needed. The Business Manager shall refer applicants to the Employer by first referring applicants in GROUP I, in the order of their place on the "Out of Work List"

and then referring applicants in the same manner successively from the "Out of Work List" in GROUP II, then GROUP III, and then GROUP IV. Any applicant who is rejected by the Employer shall be returned to his appropriate place within his GROUP and shall be referred to other employment in accordance with the position of his GROUP and his place within the GROUP.

. . .

Section 19. A copy of the Referral Procedure set forth in this Agreement, shall be posted on the Bulletin Board in the offices of the Local Union and in the offices of the Employers who are parties to this Agreement.

No. 80-833

DEC 29 1980
ALEXANDER ROBERTS, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL UNION NO. 35, OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Petitioner,

v.

CITY OF HARTFORD, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

RICHARD F. BELLMAN
EISNER, LEVY, STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013
(212) 966-9620

ALEXANDER A. GOLDFARB
Corporation Counsel

RICHARD M. COSGROVE
Deputy Corporation Counsel
Municipal Building
550 Main Street
Hartford, Connecticut 06103
(203) 566-6440

Counsel for Respondents

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In the

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Local Union No. 35, of the International Brotherhood of Electrical Workers,

Petitioner,

v.

City of Hartford, et al.,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

Opinions Below

The district court's opinion is reported at 462 F. Supp. 1271, and the Second Circuit's opinion is reported at 625 F.2d 416. Both opinions are reprinted in the appendix filed with the petition.

Statement of the Case

The Petitioner, Local Union No. 35 of the International Brotherhood of Electrical Workers, challenges the City of Hartford's Affirmative Action Ordinance and Plan for the hiring of minority workers on city-financed construction projects. The Petitioner seeks to halt implementation of the Hartford Ordinance with respect to the electrical construction trades.

The events leading to the enactment of the Hartford Ordinance and Plan began in 1970 when local civil rights leaders met with Hartford's Deputy Mayor, Nicholas Carbone, to protest the exclusion of minority workers from the building trades industry. This meeting occurred shortly after the City had experienced serious civil disturbances in the lower income black community. The leaders focused on discrimination in the building trades unions as the City was entering a period of major municipal construction. These leaders demanded that the City act to insure that minority workers would be employed on the City projects.

In response to this protest, the Deputy Mayor brought together representatives from the Hartford Building Trades Council, the trade unions and the minority community to discuss and negotiate methods for increasing minority involvement in the construction trades. These negotiations ultimately led to the adoption in September 1970 of a voluntary affirmative action plan for the Hartford construction industry. The plan called for gradually increasing the proportion of minority group persons in the craft trades to a level of 15% for each trade, the increases to occur over a five year period (Ct. of App. Jt. App. A142-143).

Unfortunately, after the announcement of the voluntary effort, virtually no action was taken to implement the plan and only a few of the building trade unions actually subscribed to the program. In mid-1974, the community representatives again complained to the Deputy Mayor of discrimination in the skilled trades and the exclusion of minority workers from the city job sites (Ct. of App. Jt. App. A143).

In the face of non-compliance with the voluntary plan, the Deputy Mayor again contacted the building trades

representatives and advised them that the City was compelled to enact remedial legislation. The Deputy Mayor asked for and obtained the assistance of the trades in the drafting of a new ordinance. The Ordinance ultimately enacted permitted Hartford to implement essentially the same plan that had been negotiated voluntarily in the early 1970's (Ct. of App. Jt. App. A143-144).

Hartford's Court of Common Council adopted the Ordinance on February 9, 1975. The Council set forth in the Ordinance that it sought to ensure, ". . . equal employment opportunity for minority group persons and women in all phases of construction work, including the bidding process, performed pursuant to major contracts offered and awarded by the city under the provisions of the Charter and this Code" (A71). Through a series of legislative findings the Council made clear that it was acting in response to a clear pattern of discrimination among contractors and unions in the Hartford construction industry. The Ordinance states:

> (a) Many contractors, labor unions, hiring halls, crafts and trades in the construction industry in the Greater Hartford area have discriminated, and continue to discriminate, against minority group persons and women.
>
> (b) It is the intention of the City not to aid or abet such discrimination by awarding contracts to contractors who practice or have practiced discrimination against minority group persons and women, or who have subcontracted to, or engaged the services of, individuals and organizations that deny or have denied equal employment opportunity to minority group persons and women.
>
> (c) The continuing effects of past and present discrimination against minority group persons and women by the construction industry may be prevented,

> mitigated and/or eliminated by an affirmative action plan.
>
> (d) There is a sufficient number of qualified minority group workers and women in the Greater Hartford Area to make such an affirmative action plan feasible and desirable (A71).

Hartford structured its ordinance to encourage minority hiring on City construction projects through the placing of principal responsibility on City contractors. Those contractors submitting bids on Hartford projects are required to provide affidavits by all their subcontractors and unions with employment referral arrangements attesting to the agreement by these entities to abide by the Affirmative Action Plan and goals. The Ordinance also directed that the Council adopt an Affirmative Action Plan which would be included as a contractual provision in all major City construction contracts. The Ordinance mandates that the Plan establish "reasonable minimum percentage goals for minority group and female employment in the construction industry . . ." (A74).

In accordance with the directive of the Ordinance, the Council adopted the Affirmative Action Plan pursuant to which signatory contractors are required to make a "good faith effort" to achieve a level of minority employment on City jobs of at least 15% on a trade by trade basis (A85-87).

The petitioner repeatedly advised the district court that it did not challenge the legality of the Hartford Ordinance or Plan *per se,* nor did it contest the basic underlying legislative findings contained in the Ordinance regarding discrimination against minority workers in the Hartford building trades. Instead, the petitioner only contended that the Plan was unlawful as applied to the petitioner, as there had been no specific finding of discrimination with respect to the activities of Local 35 (A11; Ct. of App. Jt. App. A178, 132-137).

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Second Circuit's decision does not conflict with the decisions of this Court.

The petitioner seeks to raise issues already fully reviewed and resolved by this Court in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979); and *Fullilove* v. *Klutznick*, 65 L. Ed. 2d 902 (1980). These cases make clear that a race conscious remedial program may be undertaken by a governmental entity in order to overcome a consistent pattern of past discrimination.

In *Bakke*, the Court stated that it is permissible for a governmental entity to afford preferential treatment to minority citizens who have suffered from past discrimination:

> . . . where a legislative or administrative body charged with responsibility made determinations of past discrimination by the industries affected and fashioned remedies deemed appropriate to rectify the discrimination. E.g., *Contractors Association of Eastern Pa.* v. *Sec'y of Labor*, 442 F. 2d 159 (CA 3), *cert. denied*, 404 U.S. 954 (1971); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 490 F. 2d 9 (CA 1 1973), *cert. denied*, 416 U.S. 957 (1974). 438 U.S. at 301-02.

The Hartford Council did in fact set forth in the Ordinance the prescribed findings of past discrimination with respect to the industries affected by its affirmative action program. The petitioner neither challenged those findings,

nor questioned the propriety of the Ordinance itself.* Furthermore, the petitioner did not take issue with the City's proof that Hartford trade union officials themselves, recognizing the long-standing exclusion of minority workers from the trade unions, participated in drafting both the initial voluntary affirmative action plan and the subsequent Ordinance (see Ct. of App. Jt. App. A145).

Petitioner argues instead that the Ordinance and Plan is unconstitutional as applied to it as the City did not particularize any findings of discrimination in Local 35. The Second Circuit rejected this argument, stating:

> . . . a valid affirmative action plan need not be based on a particularized finding of past discrimination by every employer or union affected. It is enough that there is a finding of discrimination in the industry concerned. To hold otherwise would enable parts of the industry to frustrate the plan by assigning various functions to those who had not previously discriminated (A11).

The lower court's ruling is obviously correct in light of Justice Powell's approval in *Bakke* of the *Contractors Association* and *Altschuler rulings. Bakke, supra,* 438 U.S. at 301-02. In both the *Contractors Association* and *Altschuler* matters, the circuit courts upheld affirmative action plans involving industry-wide findings of discrimination in the building trades.

The record below does show that as late as 1969, the percentage of blacks employed as skilled electricians in

---

* In one memorandum, for example, the petitioner advised the District Court that it was not making a general attack on the City's affirmative action plan and, "is not challenging for the purpose of its motion for summary judgment the City's legislative finding that, as a general proposition, there has been discrimination in the construction industry. . . ." (Pls. Reply Br. to Defts. Supplemental Memorandum, p. 4).

Connecticut was only 0.7% (A 11), thus confirming that the petitioner was one of the trade unions from which minority craftsmen had been excluded. Also, the pervasive pattern of discrimination that exists throughout the craft unions led Justice Brennan, writing for the majority in *Weber*, to state that, "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusions a proper subject for judicial notice." *Weber, supra*, 443 U.S. at 198, n. 1.

Petitioner also contends that the City of Hartford, as a subordinate governmental institution, is not an appropriate entity with authority to legislate an affirmative action program. This assertion simply ignores the fact that affirmative action programs adopted at the municipal level repeatedly have been upheld by the courts. See *Detroit Police Officers Association* v. *Young*, 608 F. 2d 671 (6th Cir. 1979), *pet. for cert. pending*, No. 79-1061; *Baker* v. *City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979); *Doores* v. *MacNamara*, 476 F. Supp. 987 (W.D. Mo. 1979). See also *United States* v. *City of Miami, Florida*, 614 F. 2d 1322 (5th Cir. 1980);

The Petitioner, in arguing that a municipality lacks authority to adopt an affirmative action ordinance, cites to *Associated Gen. ETC.* v. *San Francisco Unified Sch.*, 616 F. 2d 1381 (9th Cir. 1980) and *Fullilove* v. *Klutznick*, *supra*. Neither of these decisions, however, supports petitioner's claim. In *Associated General*, the affirmative action program promulgated by a state agency mandated activity which was in direct conflict with the provisions of an act adopted by the state legislature. The Ninth Circuit held that in such a situation the administrative regulations must give way to the legislative enactment. The state legislature, the court noted, clearly is the body with overriding authority and is directly accountable through the electoral process to the people. No such conflict exists in

the instant matter as Hartford's program was adopted by the city's legislative arm and is not in conflict with state law.

This Court's ruling in *Fullilove* does not in any way indicate that Hartford was foreclosed from promulgating race conscious remedial legislation. This Court stated that special deference must be given to Congress when it undertakes to legislate within its constitutional powers. Nothing in the *Fullilove* ruling, however, in any way implies that the Court intended to limit the authority of other public entities to adopt affirmative action programs. The petitioner's argument that *Fullilove* is to be read in this restrictive manner also ignores the clear thrust of *Bakke* that local governmental bodies may undertake affirmative action efforts.

Certainly, the principal and largest municipality in Connecticut is an entity with sufficient authority and responsibility to undertake an affirmative action effort. This is especially true when the effort is directed at eliminating discrimination with respect to the carrying out of City contracts.

Furthermore, there is no merit in the petitioner's claim that Hartford's 15% minority hiring goal is unreasonable. The petitioner argues that northern Connecticut, Local 35's jurisdiction, had a minority population of about 7%, a figure which is approximately the same as Local 35's minority membership and, therefore, the 15% goal is excessive. The petitioner fails to note, however, that in 1970 when the issue of discrimination arose before the Council, 35.5% of Hartford's population was minority and that percentage has increased substantially since the census. Moreover, it was not until the petitioner reached the Court of Appeals that it challenged for the first time the 15% Hartford goal and sought to challenge the legislative finding that there were sufficient qualified minority and female

workers available to make the hiring of minorities on city contracts to the level of 15% both possible and desirable (A13).

Finally, the petitioner made no showing to justify a review of its claim that the Hartford plan violates Title VII of the Civil Rights Act of 1964. In the instant matter, as in *Weber*, the affirmative action plan is "designed to break down old patterns of racial segregation and hierarchy," is temporary in nature and does not unnecessarily trample the interests of white employees. The Second Circuit was obviously correct when it held that, "The Ordinance and Plan before us have a less significant impact on nonminority workers than did the Plan in the *Weber* case . . ." (A18).

II.

There are no valid state law challenges to the Hartford Ordinance.

The petitioner raises several state claims in challenging the Hartford affirmative action program.

First, the petitioner argues that Hartford had no authority to adopt the Ordinance or Plan. This argument fails, however, in light of the City's clear delegated power to enter into contracts and to establish regulations with respect to the making and carrying out of its contracts. The Hartford City Charter specifically states in Chapter VIII, § 11 that, "The council shall establish by ordinance, rules and regulations under which contracts shall be made and carried out for all public works and improvements" (Petition, pp. xviii-xix).* In addition, the Charter extends

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* Hartford's Charter was approved by the Connecticut Legislature pursuant to Special Act No. 30, 1947 Session of the General Assembly. Furthermore, pursuant to § 7194 of the Connecticut General Statutes, municipalities which have adopted charters are granted the authority to enter into contracts.

to the Council (Chap. II, § 5) general power to "adopt ordinances . . . for the preservation of the public peace, health, safety, comfort and welfare of the inhabitants of the city . . ." (Petition, p. xviii). Local 35 does not even attempt to explain why the City would be foreclosed under these delegated powers from undertaking the challenged program.

Second, the petitioner argues that the Hartford program runs afoul of the state constitutional provision insuring equal protection of the laws and prohibiting discrimination and the Connecticut Fair Employment Practices Law which bars discrimination in employment. The petitioner has presented no Connecticut authority, however, to support its argument that these provisions prohibit race conscious affirmative action efforts and are to be construed in a fashion contrary to Title VII. Indeed the Connecticut courts have held that the equal protection and non-discrimination clauses of the state and federal constitutions have substantially the same meaning. *Snyder* v. *Town of Newton*, 417 Conn. 374, 381, 161 A. 2d 770 (1960).

Local 35 commenced this action in federal court, and, from the outset, relied principally on federal claims in challenging the Hartford program. When the district court rejected its challenges based on federal laws, the petitioner began to press state court claims and demanded that the federal court apply the doctrine of abstention. The courts below properly ruled upon petitioner's state asserted claims and the matter was resolved properly in the federal courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

December 24, 1980

Respectfully submitted,

RICHARD F. BELLMAN
EISNER, LEVY, STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013
(212) 966-9620

ALEXANDER A. GOLDFARB
Corporation Counsel

RICHARD M. COSGROVE
Deputy Corporation Counsel
Municipal Building
550 Main Street
Hartford, Connecticut 06103
(203) 566-6440

Counsel for Respondents

No. 80-833

In The

Supreme Court Of The United States

OCTOBER TERM, 1980

LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

v.

CITY OF HARTFORD, CITY MANAGER OF THE CITY OF HARTFORD, COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD, CONTRACT ENFORCEMENT COMMITTEE OF THE CITY OF HARTFORD, AND RONALD FLETCHER, INDIVIDUALLY AND AS SENIOR FIELD REPRESENTATIVE OF THE COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

WILLIAM S. ZEMAN
JOEL M. ELLIS
18 North Main Street
West Hartford, Connecticut 06107
(203) 521-4430
Attorneys for Petitioner

TABLE OF AUTHORITIES

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REPLY BRIEF

On pages 6-7 of the defendants' (hereinafter collectively referred to as "City") Brief In Opposition it is stated that the "record" shows that in 1969 blacks employed as skilled electricians in Connecticut was only 0.7% and that this confirms that the Union was one of the trade unions from which minority craftsmen had been excluded.

The above constitutes an argument first raised in the brief in opposition. The City never before claimed that the Union had been guilty of exclusionary practices.

The new claim does not withstand analysis.

The City in said new claim admits that the Union was only one of several electrical trade unions in Connecticut but the City omits to mention that the "record" to which it refers does not indicate what was the minority composition of the Union or of any other separate entity. Notwithstanding that logical gap, the City makes the unjustified conclusion that the generalized 0.7% figure proves that the Union excluded minority craftsmen. The proof is not only not self-evident but is logically absurd. "Proof" by means of guilt by association proves nothing except the twisted "logic" of the accuser.

The 0.7% figure is found in a study entitled "Blacks in the Construction Trades and Effect on Connecticut Economy, June 1970 Labor Education Center the University of Connecticut" which was attached to one of the City's affidavits submitted to the Trial Court.

On page 17 of the study it was stated that in the summer of 1969 the study's field staff visited 301 construction sites to obtain data on the number and proportion of blacks employed by occupation. Six Thousand

Five Hundred Eighty workers were found employed at those sites. [It was also stated that in June 1969 the total number of on site workers actually was 45,900.] The on site visits revealed that 0.7% of the electricians were black. The total number of electricians covered in the survey was 593. However, the study also indicated that in 1969 the number employed as electricians was 2,100. The study does not indicate what was the minority composition of the remaining 1,507 electricians. There is no indication that the 593 "sample" was statistically valid such that any generalization from that grouping validly could be made.

The study also indicates in 1969 that there were seven separate local electrical trade unions in Connecticut. The study does not list the locals separately nor does it indicate the minority distribution in any of them individually. Thus, there was no indication in the study as to what was the minority distribution in 1969 in Local 35. There existed no proof in the study that the minority membership in Local 35 was 0.7%.

The City studiously fails to mention other information contained in the above study. For example, on page 2 of the study it is stated: "The study was unable to find any overt cases of discrimination against blacks in the entry process." Also, on pp. 81-82 of said report it is stated: "A program for assisting minority group workers enter the electrician field has been in effect in the Hartford area since last September [1969]. This is a joint effort between the Urban League and the Joint Apprenticeship Council. The main feature of this is the special recruitment effort and the setting aside of a number of apprentice slots for minority group youths.... The council expects to open 50 apprentice opportunities next September with special preference for minority group youths." It can hardly be argued that a program in which the Urban League participates is in any way discriminating against minorities. It also should be noted that the above program was initiated in 1969. The City makes no claim that said program which continues

to the present day does not more than satisfy the objectives of any equal opportunity law requirements. The City makes no such claim because it cannot. So it ignores the above and then makes an unsupported outcry about exclusion at the entry level.

The City also filed with the Trial Court as part of one of their affidavits a report entitled "Manpower Information For Affirmative Action Programs 1973 Hartford Labor Market Area Prepared by the: Connecticut Labor Department...." This report asserts that in 1970 in the Hartford Labor Market Area, which included Hartford and surrounding municipalities, minorities composed 8.6% of the labor force. [Table 2] The City ignores the implications of said statistic. Why did it ignore it? Because Local 35's membership is 7.45% minority, but since the 7.45% figure is so close to the 8.6% figure the City refrains from making any comparison between them out of an obvious fear that it would undercut the new attack they have launched against the Union. Obviously, the difference between an 8.6% figure and a 7.45% figure is statistically insignificant and cannot serve as any basis for proof of discrimination.

On page 8 of its Brief in Opposition the City claims that in 1970 Hartford's population was 35.5% minority. But that figure is irrelevant because the City's affirmative action Ordinance and Plan are keyed to the region surrounding Hartford where it purported to discover discrimination and was not solely concerned with Hartford.

Other figures submitted to the trial court, but presently ignored by the City, belie the credibility of the new attack on the Union. The above report states that of the total of all craftsmen employed in the Hartford Labor market area 11% were minority persons. This is in excess of the 8.6% minority composition of the labor force and, to borrow from the "logical" premises of the defendants, this "proves" that craft exclusion did not exist in the Hartford Labor market area.

The point of this discussion is to demonstrate that the new attack by the City is not only statistically unsupported but is also intellectually meaningless.

The Union will not burden the Court with further examples of the City's playful regard for statistics since the above suffices to demonstrate the *modus operandi* of the City's approach. A quote now may well be in order, viz.: " 'too many...[defendants] use statistics as a drunk man uses a lampost - for support, and not illumination.' " Antieau, *Federal Civil Rights Acts*, sec. 149.5. (pocket part, July 1977, p. 249). The City's *modus operandi* is based on the theory of *guilt by association*. None of the statistics used by the City pertain specifically to the Union but yet the City feels free to particularize from the general to support its new claim that the Union is guilty of minority exclusion. This is yet another manifestation of the City's long held basic premise which underlies its Ordinance and Plan, namely, that mere association with an allegedly exclusionary group of unions and contractors is solely sufficient to besmirch the record of each and every entity in the group. This speculative leap is contrary to basic Constitutional principles and protections, e.g., Due Process.

On page 7 of their Brief In Opposition, defendants seek support for their position by citing Justice Brennan's dicta in *Weber* that "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusions a proper subject for judicial notice." With all due respect to Justice Brennan, his dicta is not applicable to Local 35. In our opinion Justice Brennan did not and nor should any other judge, particularize from such a general proposition so as to rule that generalized findings of craft exclusion among many unions *proves* that any particular union has engaged in exclusionary practices. And even if a judge were to be so inclined he would have to be careful not to run afoul of Federal Rule of Evidence 201 which requires that before judicial notice may be taken of *adjudicative* facts a party is entitled to an opportunity

to be heard. In this case it has never been *adjudicated* either administratively, legislatively or judicially that Local 35 has excluded minorities.

What we are confronted with in this case are "legislative facts" which are, illogically and, thus, illegally, being used to perform the role of adjudicative facts. See, *Supplement to Moore's Federal Practice Rules Pamphlet, Part 2, Federal Rules of Evidence Annotated,* 1975, p. 13. Legislative facts have relevance to legal reasoning and the lawmaking process and are utilized where a court or other body develops law or policy. "Legislative facts are often general and do not concern the immediate parties.... [W]henever a tribunal engages in the creation of law or of policy, it may need to resort to legislative facts.... The exceedingly practical difference between legislative and adjudicative facts is that, apart from facts properly noticed, the tribunal's findings of adjudicative facts must be supported by evidence, but findings or assumptions of legislative facts need not be, frequently are not, and sometimes cannot be supported by evidence." Davis, *Administrative Law Text, Hornbook Series,* 1959 ed., p. 272.

The finding[1] underlying the City's Ordinance was a legislative one and purported to state only legislative facts. As such, the finding was general in nature and was not concerned with the Union as an immediate party. The City has admitted as much. See, *Petition For Writ of Certiorari,* Statement of Facts, p. 11 ["...the City conceded that 'The affirmative action ordinance is not directed against Local Union No. 35....' "] However, in

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[1]The statement on pages 5-6 of the Brief In Opposition that "The petitioner neither challenged those findings, nor questioned the propriety of the Ordinance itself." calls for a response. This is because the quoted statement does not fully report the events at trial and, thus, is inaccurate. The inaccurary is sufficiently demonstrated by a reference to the discussion on pages 8-10 in the Petition For Writ of Certiorari which the defendants have forgotten to mention.

order to permit the City or to require the Union to run afoul of the statutory and Constitutional rights of the members of the Union's referral list there must first be established facts of an adjudicative nature establishing that the Union was guilty of past discrimination to justify the type of racial preference remedy utilized in this case. Since no such adjudicative facts were properly found by the City or any court below, the racial preference remedy effectively enforced in this case was unjustified and illegal.

The process of a legislature by which it utilizes legislative facts as supportive of a policy decision may well be by a resort to general studies as is the claim made by the City in this case. But although a legislature may deem such sources sufficiently reliable for it to reasonably give weight to their contents, the truth of such contents as they may be claimed to pertain to a particular party or case, are not thus established. Such reports may not be used to show what the facts were but only what was reported to the legislature. *McCormick, Evidence, Hornbook Series*, 1954 ed., sec. 329. The new attempt by the City to so use such studies to justify a non-existent adjudicative type of finding against the Union finds no support in the law.

Respectfully submitted,

/s/ William S. Zeman

William S. Zeman

and

/s/ Joel M. Ellis

Joel M. Ellis

both of:
18 North Main Street
West Hartford, Connecticut 06107
Tel: (203) 521-4430
Counsel for Petitioner

No. 80-833

Supreme Court, U.S.
FILED
MAY 8 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

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OCTOBER TERM 1980

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' REPLY TO SUPPLEMENTAL BRIEF

RICHARD F. BELLMAN
STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013
(212) 966-9620

ALEXANDER A. GOLDFARB
Corporation Counsel

RICHARD M. COSGROVE
Deputy Corporation Counsel
Municipal Building
550 Main Street
Hartford, Connecticut 06103
(203) 566-6440

Counsel for Respondents

RESPONDENTS' REPLY TO SUPPLEMENTAL BRIEF

This brief is submitted in reply to the Supplemental Brief filed by the petitioner in support of its petition for a writ of *certiorari*. Petitioner cites a recent decision by the Connecticut Supreme Court holding that the City of New Haven lacks the power to create a Commission on Equal Opportunity with power to hear complaints of discrimination in private employment and enter remedial orders where discrimination is determined. *New Haven Commission on Equal Opportunities, ex rel. John R. Washington v. Yale University* and *Visiting Nurses Association of New Haven, Inc. v. The Commission on Equal Opportunities of the City of New Haven,* Vol. XLII, No. 42 Conn. Law Journal, April 14, 1981, pp. 1-4. Petitioner contends that this recent Connecticut ruling supports its claim that the City of Hartford lacked authority to adopt the challenged affirmative action ordinance and plan.*

The Connecticut Supreme Court's ruling as to New Haven's authority to adopt a fair employment ordinance has absolutely no relevance to the instant matter. The fact that a Connecticut municipality may have lacked state delegated authority to regulate discrimination in private employment within its jurisdiction, does not mean that a municipality is foreclosed from eliminating discrimination in its public contracts. Obviously, a municipality's attempt to regulate private employment practices presents separate and distinct issues from those involved in a review of a municipality's authority to set standards for its contracts.

Hartford has the state delegated authority to contract and to establish conditions with respect to the making and carrying out

*The petitioner made this same argument in the Court of Appeals relying at the time on the New Haven ruling as decided by a lower Connecticut court. Petitioner raised this issue unsuccessfully in the Court of Appeals pursuant to a motion for rehearing and modification of the Court's decision.

of its contracts. The Hartford City Charter, which has been approved by the Connecticut Legislature, specifically provides that the Hartford Council, "shall establish by ordinance, rules and regulations under which contracts shall be made and carried out for all public works and improvements." Hartford City Charter, Ch. VIII, §11. See respondents' Brief in Opposition, p. 9.

In addition, the City may, pursuant to the Hartford Charter, Ch. II, §5, "adopt ordinances . . . for the preservation of the public peace, health, safety, comfort and welfare of the inhabitants of the city. . . ." See Petition, p. xviii. Moreover, the Charter provides a general grant of power which reads:

> The city shall have not only all the powers specifically granted by this charter but all powers fairly implied in or incident to the powers expressly granted, and all other powers incident to the management of the property, government and affairs of the city the exercise of which is not expressly forbidden by the constitution and general statutes of the State of Connecticut. Hartford Charter, Ch. II, §7, Petition, p. xviii.

The affirmative action ordinance and plan challenged in this case sets rules and regulations only with respect to City construction jobs. It does not undertake to regulate or prohibit discrimination in private employment. Hartford has not attempted, as did the City of New Haven, to regulate alleged discrimination among private employers who are located within its jurisdiction. The case cited by petitioner in its Supplemental Brief, therefore, has nothing whatsoever to do with the issues raised in this case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in respondents' Brief in Opposition, the petition for writ of *certiorari* should be denied.

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Respectfully submitted,

RICHARD F. BELLMAN
STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013
(212) 966-9620

ALEXANDER A. GOLDFARB
Corporation Counsel

RICHARD M. COSGROVE
Deputy Corporation Counsel
Municipal Building
550 Main Street
Hartford, Connecticut 06103
(203) 566-6440

Counsel for Respondents